Supreme Court, U. S.
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APPENDIX

Volume II, Pages 531–1109

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1560

UNITED STATES OF AMERICA, PETITIONER
v.
UNITED STATES GYPSUM COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

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DX (Brown) 37..... 3376
DX (Brown) 38..... 3377
DX (Brown) 41..... 3379
DX (Brown) 43..... 3380
DX (Brown) 45..... 3381
DX (Brown) 48..... 3383
DX (Brown) 49..... 3385
DX (Brown) 50..... 3387
DX (Brown) 51..... 3389
DX (Brown) 55..... 3391
DX (Brown) 57..... 3392
Watt: DX (Watt) 1..... 3394
Defendants' joint exhibits:
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DJX 2 3401
DJX 12 3403
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The COURT. The jury can look at those for that purpose.

Mr. MELLOTT. Particularly the pink sheet ones, which are Exhibits 469 through 490.

The COURT. They can look at them, and you can argue it.

Mr. MELLOTT. All right, Your Honor.

• • • • •

[5443] ARNOLD L. E. MEYER called as a witness and having been first duly sworn, was examined and testified as follows:

• • • • •

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Will you state your name and residence address, please?

A. Arnold L. E. Meyer; residence address, 4746 Broken Hill Drive, Apartment 2, St. Louis, Missouri, Zip 63123.

• • • • •

Q. Now, you worked for Georgia-Pacific beginning when?

A. At the time that they merged.

Q. I am sorry. When I say Georgia-Pacific, I should have said Bestwall.

A. Bestwall?

Q. Yes, sir.

A. I don't understand the question. May I have it again?

Q. Before Georgia-Pacific acquired Bestwall, it was the Bestwall, was it not?

A. Bestwall Gypsum Company; that's right.

[5445] Q. And when did you first start working for them?

A Well, I worked for Certain-Teed Products Corporation, which later spun off the Bestwall Gypsum Company.

Q. Let's put it this way. How long have you been in the wallboard business—had you been in the wallboard business?

A. In the gypsum business, since 1942.

Q. And your employment was Certain-Teed, Bestwall, and, subsequently, Georgia-Pacific; is that correct?

A. That is correct.

Q. Now, focusing for these initial questions, Mr. Meyer, on later years, when did you retire from Georgia-Pacific?

A. July—I mean—January—December 31, 1969.

• • • • •

[5446] Q. You turned over the reins to someone else; is that correct?

A. That is correct.

Q. Was that Mr. Fatz and Mr. Burch?

A. That's right.

Q. And did you——

A. Excuse me. To Mr. Fatz, as far as the early part of '69 was concerned.

Q. And then, subsequently, to Mr. Burch for the latter part of 1969?

A. That's right

Q. Now, did you identify to each of these two gentlemen, at the correct times, the competitors with whom you were having telephone conversations?

A. Yes, they were aware of it.

Q. And did you identify, for each company, which ones you were talking with? For example, did you tell them Celotex was principally Don Miller?

A. Yes. I say they were aware of that from conversations.

Q. All right. Now, what I would like to do is briefly go down the list of companies, your major competitors, and I would like for you to identify, in each one of those [5447] companies, to the extent that you can recall, the people whom you identified in one form or another to both Mr. Fatz and Mr. Burch.

Mr. MALLIN. Your Honor, is this 1969?

Mr. FRICANO. In 1969, that is what I am——

By Mr. FRICANO:

Q. You understood my question, didn't you, sir?

A. I understood your question. That's right.

The COURT. What was the point of what you said, Mr. Mallin?

Mr. MALLIN. I am not sure whether the question is identification of calls in '69 or individuals in '69, and I just thought that ought to be clear.

The COURT. Well, you listen to what the question is and you will understand that.

By Mr. FRICANO:

Q. You heard me say "identify individuals;" did you not?

A. You said "identify individuals;" yes, sir.

Q. Let's start with United States Gypsum. Whom did you advise Mr. Fatz and Mr. Burch was your telephone contact, in any event, at United States Gypsum?

A. Well, could I say something, here, with reference to that, that might clarify the point?

[5448] Q. Certainly.

A. Because you asked—as I understand, your question was who these individuals were that I identified——

Q. Yes.

A. [continuing], to these other gentlemen in the company; and, in that respect, the inference is, of course, that I did this in a more or less formal way.

Q. Yes.

A. Which was not the case. These people had been—particularly Mr. Fatz had been working as one of my right-hand men for a number of years, and so he was aware of these things.

Q. I see.

A. Without my having to sit down with him and tell him about it.

Q. Well, then, would you please tell me, with respect to both Mr. Fatz and Mr. Burch, in this connection, now, the people—not the people whom you told them about, but—let's just go through your contacts with each of the major competitors in that fashion. United States Gypsum——

Mr. MALLIN. Your Honor, now that they are on contacts, I think we ought to be clear what year we are talking about the contact.

Mr. FRICANO. I am not—I don't think I can make that other thing.

[5449] The COURT. All right.

By Mr. FRICANO:

Q. In 1960—excuse me. You did, from time to time, from the period 1960 to the time of your retirement, contact your competitors by telephone with respect to prices, terms, and conditions of sale, job price protection, and other matters relating to

Mr. DeLone. Objected to unless the period is specified.
Mr. Fricano. I had specified the period, Your Honor.
Mr. DeLone. Unless it is specified with more precision from 1960 through 1969.
The Court. No. He can ask it that way.
Go ahead.

By Mr. Fricano:

• • • • •

[5452] Q. Mr. John Brown?
A. Yes.
Q. Mr. Ken Atwell?
A. Yes.
Q. Mr. Jay Nicely?
A. Yes.
Q. Mr. Earl Kroth?
A. Yes.
Q. Mr.—His last name is Webster. He is called Dan Webster?
A. I don't know the gentleman.
Q. Mr. Hilton Hornaday?
A. I don't know him.
Q. Mr. Barber, credit manager?
A. I do not know him.
Q. Mr. Jack Hayes?
A. I do not know him.
Q. All right, moving along.
At Celotex, Mr. Marvin Greenwood?
A. Yes.
Q. Mr. Don Miller?
A Yes.
Q. And his assistant, Mr. Fisch?
A. I don't recall any contacts with Mr. Fisch.
Q. Warren Hill at Celotex?

[5453] A. Yes.
Q. Marshall Goddard?
A. I don't recall any contacts with Goddard.
Q. Mr. Jarrett, the credit manager?
A. No contact.
Q. With any of his subordinates—Mr. Kellogg?
A. No credit people in the company that I know of.

the sale of gypsum products; did you not?
A. As a matter of verification of competitive reports; yes sir.

[5450] By Mr. Fricano.

Q. All right, sir, we will get into that in a while.
Now, during this period, then, sir, who were your contacts at United States Gypsum?
A. Well, over that period of years there were probably a number of them, and I don't recall at this point all of them.
Q. May I mention some names to you?
A. If you would, I would appreciate it. I could identify them more quickly.
Q. How about a Mr. Baer?
A. Yes.
Q. And his superior, his boss before him, Mr. Sadler?
A. Yes.
Q. Now I am going to take you right straight through chronologically. I am going to try, in any event.
We have Baer. And Bear and Sadler were about 1960; were they not?
A. That would have been in the earlier years, that's right.
Q. All right. Bear and Sadler.
And then after Bear and Sadler we have Mr. Gimlin; do we not?
A. Yes.
Q. And his subordinate, Mr. Weiser; correct?

[5451] A. I do not recall any contact with a Mr. Weiser.
Q. Mr. Joe O'Brien?
A. Or O'Brien.
Q. All right.
And later into the period Mr. Evans, Bob Evans?
A. Yes.
Q. And Mr. Galvin?
A. I do not know Mr. Galvin.
Q. Mr. Baldwin?
A. No.
Q. Mr. Lane?
A. I don't recall any contact with Mr. Lane.
Q. All right, sir.
Now, National Gypsum.
Mr. John Brown?

Q. Was the responsibility for ascertaining deviations from credit terms or alleged deviations from credit terms the responsibility of your credit people as distinguished from you?

A. Yes.

Q. Do you know whom they were contacting at their competitors?

A. No, I do not.

Q. At Kaiser Gypsum. James Hague?

A. Yes, sir.

Q. Costa?

A. Yes.

Q Harper, the President?

A. In the period mentioned, I would say no.

Q. In the prior period—Never mind, I will withdraw that. Crowle. Mr. Crowle or Crowell, I am not sure how he pronounces his name.

[5454] A. I know the gentleman, but I don't think I ever had any contact with him with reference to price verification.

Q. At Flintkote. Mr. Warren Malhiot?

A. Yes, sir.

Q. Mr. Moran, the President?

A. Again, I know the gentleman, but I don't recall any contact with him.

Q. Mr. Pecaro, Chairman of the Board?

A. Same answer.

Q. Mr. Seitz, S-E-I-T-Z?

A. Yes. That's William Seitz?

Q. Yes, sir.

A. Yes.

Q. Mr. Tom MacDonald at Flintkote?

A. I don't recall any contact with Mr. MacDonald.

Q. Mr. Anderson or Mr. Carpenter? I will take them one at a time.

Anderson?

A. No, sir.

Q. Carpenter?

A. No, sir.

Q. Was there a Storey there that you had a contact with, a man by the name of Storey?

A. Yes.

Q. All right, Johns-Manville.

[5455] Mr. Marion?

A. Yes.

Q. His assistant, Mr. Smith?

A. I don't recall any contact with Mr. Smith.

Q. Mr. Deutsch, Vice-President?

A. Again, I knew the gentleman, but I didn't have any contact with him that I recall.

Q. Mr. Comann, C-O-M-A-N-N. Sometimes he is referred to indirectly as "Coleman."

A. I don't know the gentleman.

Q. Fibreboard or Pabco, as it is known in the trade.

Mr. O. C. White, their General Manager I believe he was.

A. Yes.

Q. Anyone else at Fibreboadr?

A. I don't recall

Q. Ted Armstrong, Sr., President of Texas Gypsum Company?

A. Yes.

Q. Do you know a Mr. Claude Huckleberry?

A. I have met him?

Q. You have met him?

A. Yes.

Q. Is the Texas Gypsum Company that we have just identified, and Mr. Armstrong, the company which at one time [5456] Mr. Huckleberry had an interest in and later sold out?

A. I believe that is correct.

Q. Do you recall when Mr. Huckleberry first came on-stream with Texas Gypsum Company back in 1960—late 1960?

A. I don't remember whether that's the correct year, but I remember when they came on-stream, yes.

Q. American Gypsum. Mr. Melvin Quayle?

A. Yes.

Q. Did these conversations with respect to prices [5457] also occur at the occasion—not during, but at the occasion of Gypsum Association meetings?

A. In lieu of telephone contact, yes.

* * * * *

[5458] Q. Well, for example, did you tell your customers that you were sharing this information with your competitors?

A. No, sir.

Q. Did you tell your salesmen?

A. No, sir.

Q. Did you tell your lawyer, for example, the depth and degree of frequency that you were having these conversations, Mr. Meyer?

A. I don't know that I was ever called upon to do so.

Q. So the answer to my question is "no?"

• • • • •

[5459] Q. If someone in this room unfamiliar with the wallboard industry—or even with the familiarity—knowing that it was made up of a number of large competitors and a number of smaller single plant producers, knowing the product—not intimately like you have since 19—whatever it was—If I saw in your handwriting or in Mr. Sikes' handwriting down at the bottom of a page "No." with a "1" circled, and a date, should I know what that means?

Mr. MALLIN. Objection, Your Honor.

[5460] By Mr. FRICANO:

Q. Or should anyone know what that means with that degree of familiarity?

Mr. MALLIN. Objection, Your Honor. It is just speculation and argument.

The COURT. Will you word it:

Can it be told from the record that . . .

Mr. FRICANO. I am sorry, that's the way it should be.

By Mr. FRICANO:

Q. Can it be told from that example what that means?

A. Not unless one knew a shorthand which was my shorthand, any more than they could tell my secretary's if they didn't know her shorthand.

Q. So if someone were to go through a series of documents, seeing "No, No. 1," or "Yes, No. 3," or "No, 1, 3 and 4," or perhaps with another little initial like a "G" that's circled, is it fair to state that unless they knew your code that they wouldn't be able to interpret those?

A. Well, I don't like the reference to the system of shorthand that I used as a mysterious code of some kind.

Q. Mr. Meyer, I didn't ask you whether it was a mysterious code or not. I am asking you, and you told me you didn't try to keep your conversations private. I am trying to ascertain from you how in the world anybody would [5461] know, from looking at your documents, that you were talking to your competitors?

A. Well, they wouldn't. But then, I don't know that they'd have any business to either.

The COURT. All right.

Now, Mr. Meyer, I am going to tell you this, and I don't want to tell you again. You answer the questions that are asked you and don't argue the point. There are sufficient lawyers in this room to argue points without your arguing them.

The WITNESS. I am sorry, Your Honor.

By Mr. FRICANO:

Q. All right, Mr. Meyer.

It is a fact, is it not—and I will try to cut through this as quickly as I can. It is a fact that you did have a shorthand code which identified for you and your subordinates the people with whom you were talking to at your competitor companies; did you not?

A. That is true. For my own use.

Q. That's right.

Of course if Mr. Sikes picked it up, or Mr. McCaskill picked it up they'd know what the code meant; would they not?

A. Very probably.

Q. And your code was: No. 1 was United States Gypsum, [5462] the largest company; was it not?

A. I believe it was.

[5463] By Mr. FRICANO:

Q. And number two was National Gypsum Company, was it not?

A. That is right.

Q. And you didn't have number three because you were number three, weren't you, Georgia-Pacific?

A. No, I beg your pardon. I had a number three.

Q. Who was number three?

A. I believe it was Celotex.

Q. Well, we will show you documents—who was number four then?

A. I don't recall.

Q. All right. Sir, we will show you documents which might refresh your recollection on that.

A. I would appreciate it.

Q. Did you go right down the list; did you have a number for Kaiser and a number for Johns-Manville?

A. I don't remember.

Q. Do you still say you didn't try to keep your conversations private?

A. Yes, sir.

Q. Is it your testimony now, Mr. Meyer, that the only thing you did with your competitors was ask a single question and get a simple answer?

Mr. KECK. Objection, Your Honor, [5464] to the argumentative tone of the question. I think it's an unfair question.

The COURT. You can answer the question.

The WITNESS. Would you please restate the question.

By Mr. FRICANO:

Q. Certainly.

Isn't it fair to say, Mr. Meyer, that in these conversations which you had with your competitors, they were very far ranging, giving excuses for prices, talking about internal policies of not only your company but finding out internal policies of other companies, and they were not in any sense of the word a pure yes or no verification?

Mr. MALLIN. Objection, Your Honor. These are far-ranging conversations, and he is trying to characterize, and there were any number of conversations without a specific question about a definite conversation.

The COURT. This is the way I rule it should be done, Mr. Mallin.

Mr. MALLIN. I didn't so understand. In any event, I object to it.

The COURT. Well, after a ruling is made, it doesn't do you much good to object to it.

• • • • •

[5456] • • •

Q. Well, isn't it a fact, Mr. Meyer—we will start at the beginning. Isn't it a fact that in one year you called Mr. Atwell at National Gypsum and you found out what their internal policy was with respect to trucking in Florida?

A. I may have done that in response to a question with respect to a particular competitive situation that caused me to initiate the call in the first place.

Q. Oh, that makes a difference, does it?

A. Well, certainly it does because I was verifying—I beg your pardon. I am now argumentative.

Mr. DELONE. I ask that the witness be allowed to finish his answer.

Mr. FRICANO. I didn't stop him.

The COURT. You can finish your answer.

By Mr. FRICANO:

Q. Did I stop you, Mr. Meyer?

A. No, I stopped myself.

Q. All right, Mr. Meyer, did you or did you not find out the internal policies of National Gypsum Company with respect to the trucking practices in the southeastern part of the country, Florida, at one time?

A. I may have.

[5466] Mr. DELONE. I object to that question. Are you asking about the southeastern part of the country, or the state of Florida? They are not synonomous as I understand. It is a double question.

By Mr. FRICANO:

Q. Mr. Meyer, did you not find out from Mr. Atwell in 1966, I believe it was, the internal policy and practice, a new one, that National Gypsum was about to institute in Florida?

A. My answer to that question would have to be no on the basis of my policy with respect to asking questions of a competitor.

Mr. FRICANO. May the witness have GX 155, please.

[An exhibit is handed to the witness.]

The WITNESS. I have it.

By Mr. FRICANO:

Q. Now, is that your handwriting on the front page, the first page?

A. No, no part of it is my handwriting.
Q. None of the first page is?
A. No, sir.
Q. Do you recognize the handwriting?
A. I recognize the handwriting on the bottom. I don't recognize the handwriting on the top-half of the page.

[5467] Q. Whose handwriting is it on the bottom half of the page?
A. That appears to be Mr. Sikes.
Q. And do you recognize the handwriting on the second page?
A. That appears to be Mr. McCaskill.
Mr. FRICANO. I offer the exhibit.
Mr. MALLIN. No objection, Your Honor.
The COURT. Admitted.
[Government Exhibit No. 155 was received in evidence.]

By Mr. FRICANO:

Q. Now, with respect to the second page of that exhibit, it states, does it not, "A. L. M." Who is that? That is you, isn't it?
A. That is me.
Q. "National announced internally that they are meeting Kaiser in Southeast except southern tip of Florida."
And then the initials "K. A." are there. Who is "K. A."?
A. Well, that would possibly be Ken Atwell, National Gypsum Company.

[5488] Q. That is correct.
And then there is a date November 4, 1966?
A. That is right.
Q. Is this a verification, Mr. Meyer?
A. Yes, it is a verification. If there was an excessive situation reported which there most certainly was at that time because that part I do remember.

• • • • •

Mr. FRICANO. Now, may the witness [5469] have GX 39.
[An exhibit is handed to the witness.]

• • • • •

[5470] Q. That is Mr. McCaskill's handwriting, isn't it?

A. Yes.
Q. And it is dated February 19, 1963, is it not?
A. '63 doesn't appear on there.
Q. Well, it is on the attached sheet though, isn't it, the sheet to which it is attached?
A. Yes, sir.
Q. And it says, "Confidentially" up at the top, doesn't it?
A. Yes, sir.
Q. And then it says "A. L. M." and "R. Sikes. For your information, please route to R. Sikes" and then the [5471] note, "Bob, please relay to Ken Atwell for John Brown's information."
This is a three-way exchange now, isn't it, Mr. Meyer?
A. Well, it would appear so, I guess.
Q. Is this a verification, Mr. Meyer?
A. Well, it is a verification, yes.
Q. A verification of internal business of three different companies, is it not?
A. It's a verification of a price competitive situation, that is right.
Q. That is right.
And on the first page, on a United States Gypsum Company letterhead, certain questions are posed, are they not, at the bottom of the page, in your handwriting?
A. That is correct.
Q. And they are questions which were directed to Robert Sikes, your subordinate, to be asked of United States Gypsum Company, were they not?
A. That is right. But this letter that was directed to this, apparently, dealer in San Antonio, Texas, came to us, I am sure—I can be sure about this because of the very nature of my questions. I believe I can be sure of that, and that my first question there to him is: "Presume Prieske is a contractor."

[5472] So that this copy here, which says—the original is a copy, the original that you have in here as an exhibit is a photocopy, and so that was sent to us presumably by our people in the field as evidence of a competitive situation.
Q. That is right.
And Mr. McCaskill was disturbed by it, wasn't he?
A. Apparently he was disturbed about it, right.

Q. So he instructed Mr. Sikes, your subordinate, to find out what was going on and let Ken Atwell know and John Brown, didn't he?

A. That would appear from this evidence here, yes, sir.

Q. And Mr. Sikes did find out from United States Gypsum, and the answers are written up in the left-hand corner, and the answer to the first question is: "Stupid mistake," isn't it?

A. "Stupid mistake" is said here, yes.

Q. And the next answer to the next question: "Written in behalf of dealer; dealer got order"; isn't it?

A. Yes, sir.

Q. Now, you say that this kind of a situation is a verification; is that right?

A. Well, yes, it is.

• • • • •

[5476] • • •

Q. It says, "Field intelligence is the only means we have of keeping informed of what is going on in the market."

That is not true, is it?

[5477] A. Well, it is a matter of the way I look at it, I suppose.

Q. It is right back to whether you are going to keep these conversations private, isn't it, Mr. Meyer, because you are not going to tell anybody you have got contacts with you competitors, are you?

A. That is not true.

Q. Why weren't you honest with the man?

Mr. KECK. Objection, Your Honor. It is argumentative.

The COURT. Sustained

Mr. FRICANO. I am sorry, Your Honor. I apologize for that comment, Mr. Meyer.

• • • • • •

[5479] Q. Now before we get into that, Mr. Meyer—we will take up those documents immediately—you have just testified it was not your habit to volunteer information, did you not?

A. Yes.

Q. Did you not testify on a prior occasion at page 235 of your Grand Jury testimony in this courthouse on October 8, 1973—I will label this GX 5007——

Mr. MALLIN. The page number?

Mr. FRICANO. 235.

October 8, 1973, just a little over a year ago or two years ago, did you not testify as follows to the following question:

> Question: Well, let's take a slightly different example. Let's say as in this case the report was $36 less 5%. Suppose in actual matter of fact the competitor National had $36 less 2% or, to switch it around, suppose your price was $36 less 2% [5480] and the competitor came in and asked you to verify a report of $36 less 5%. In that situation would you tell your competitor that you, in fact, only had a 2% discount as opposed to a 5% discount?
>
> Answer: Yes, I would.

A. You have refreshed my memory. Apparently I did say that.

• • • • •

[5481] Q. You don't have to accept anything, Mr. Meyer. What I want you—if you answer this question—is it not the fact the purpose for the exchange of pricing information with competitors and other matters relating to competition on a continuing basis was to keep market stability?

A. Yes, I will say that.

Q. All right, sir.

Isn't it also the fact, now that your memory has been refreshed, that when you talked to your competitors and they talked to you, when the information was incorrect, you, each side, volunteered the correct information?

[5482] A. Well, as I recall, that happened so infrequently that I don't—I can't say that it was a—I can't say it was a regular thing and that was the inference I got from your question.

Q. Whenever it was necessary, you did it, did you not?

A. Yes.

• • • • •

[5483] Q. Take a look at 86 and 87, Mr. Meyer.

Now 86, which is in evidence, has your handwriting up in the right-hand corner, does it not?

A. That is right.

Q. And the bottom handwriting is Mr. Sikes' is it not?

A. Right.

Q. And it says Lumpkin, Mobile. Is that Mobile, Alabama?

A. I suppose.

Q. And there are two prices there, $41 out of warehouse, Celotex, $42.00. Can you read that?

A. Dealer carload price it looks like to me. CL is what is written on here.

Q. That would indicate that Schuerman had reported to you——

Schuerman is one of your men in the field, right?

A. That is correct.

Q. [continuing]. that Celotex had a price of $41; that Celotex contended you had a price of $41 out of your warehouse, isn't that right?

A. No, sir. I think the thing is just reversed. I think the 3 by 5, little notation that seems to be attached to the other sheet is the originator of this.

[5484] Q. Celotex is asking you?

A. Yes.

Q. All right.

And the second sheet is the answer, is it not?

A. No, Schuerman was our man.

Q. I understand that.

A. And he is saying our price is $44. When he says our price, he is speaking of the Distribution Division price to contractors f.o.b. warehouse, and he is saying that presumably to Mr. Sikes, who asked him what was our price, what are you selling at, and he said, "Our price is $44 to contractors f.o.b. warehouse."

Q. You are right, sir. You are absolutely correct.

And he is complaining that Celotex's price is $41, is that right?

A. I think Celotex is complaining that $41 was pick-up at our warehouse. You see?

Q. I see.

A. Again, a carload price of $42, dealer carload price of $42.

Q. And a contact was made at Celotex, was it not?

A. That is right. Apparently they originated the contact.

Q. And that is evidenced in the net piece of paper, is it not, in your handwriting?

[5485] A. Right.

Q. And that says—that is addressed to R. R. Sikes, is it not?

A. Yes, sir.

Q. And your initials are at the bottom?

A. Yes, sir.

[5486] Q. And the word, again, Lumpkin—that is the same fellow that is on the first sheet; isn't it?

A. Yes, sir.

Q. "Lumpkin is made about our branch operations since he has lost some customers.

2. Celotex has no deal of any kind.

3. Miller thinks Lumpkin is sore enough to sell at $32 and earn only cost discount, but he would not sell below cost."

A. "Earn only cash discount." I think that is what that is.

Q. Now, that is with a particular area, and that says "Celotex has no deal of any kind;" right? Who gave you that information?

A. Could I correct something here that I might have misled in my statement as to the origin of this thing in tying it into this other one? I see, now, you are correct when you said it was originated by Celotex.

Q. Was that Don Miller?

A. Yes.

Q. And in doing so, Mr. Miller advised——

A. I beg your pardon—that it was originated by our people, because—complaining of Lumpkin's activities, perhaps.

Q. That's right.

[5487] A. See, and the other notation that I made, which is the following day, you will notice the one is dated the 27th of September, the other the 28th, after having verified this with Celotex, I was told that they had no arrangements of any kind, and that—well, the rest of it, you read there, that Lumpkin is mad, and so forth.

Q. This is with respect to a particular marketing area, is it not, "No deal of any kind"?

A. In Mobile, I assume.

Q. That is a city, isn't it?

A. That's right.

Q. That is not just one little customer; that is a whole marketing area, correct?

A. That's right.

Q. Now, isn't it a fact that, in 1966, Celotex again advised you that there were no deals of any kind in the entire U. S. of A.?

A. Well, I don't recall that, but—are these 19—what is the year date, on these things, do you know? I don't see any year date on them.

Q. No, there isn't a year date, sir, just the——

A. Just the month and day.

Q. Month and day?

A. Um-hum.

Q. But take a look at 78.

[5488] Mr. FRICANO. May the witness have 78, please?

By Mr. FRICANO:

Q. Do you have 78?

A. I have it.

Q. Now, that is also in evidence, and the first page is a buckslip and a TWX; is it not?

A. Yes.

Q. And the buckslip—excuse me. The TWX is from Mole in the western region to you; correct?

A. Correct.

Q. And, in that, he talks about reports that American and then Celotex dealers were advertising in Seattle papers, individual pieces of 4 by 8, one-half-inch gypsum wallboard, for a dollar sixty-one a sheet discount.

A. Right.

Q. And you have the word "Celotex" circled; do you not?

A. Yes, sir.

Q. And then, in your handwriting, it says, "Denied," and the date; does it not?

A. That's right.

Q. "Denied," by whom?

A. Presumably by Celotex.

Q. Then there is a note with an earlier—excuse [5489] me, a later date, September 9, in Mr. McCaskill's handwriting; isn't there? Do you see that?

A. Yes—well, I want to se the date on this other one, just a second.

Q. It is 9/1/66?

A. Yes. I see it. It is not too clear.

Q. That is Mr. McCaskill's handwriting; is it not?

A. Yes, sir.

Q. And he says to you, in this connection:

> To A. L. M.: Please watch this, and, in the meantime, we should have a recommendation from Bill as to the extent of our discount to branch beyond seven and a half percent, rather than a trade discount off of the list.
>
> P. S. Second thought, Bill Seitz might give you a pretty good reading on industry position.

Who is Bill Seitz?

A. Bill Seitz was with Flintkote.

Q. And he was on the West Coast, wasn't he?

A. On the West Coast; yes.

Q. Wasn't this an instruction, then, for you to gather market intelligence in regard to the West Coast from your competitor?

A. That would be the suggestion there. It is not an order. I don't know that I did it.

[5490] Q. Well, did you usually follow Mr. McCaskill's directions?

A. Well, he doesn't put this in the form of a direction, though. He said "might."

Q. All right, sir.

A. So I might have done it, and I might not.

Q. Let's look at page two on this. This is in your handwriting, too; is it not?

A. Part of it.

Q. And it says, "Celotex, (Cody)." What does that mean?

A. Celotex plant at Cody, Wyoming.

Q. That is the Big Horn plant; is it not?

A. Yes.

Q. And, in that Big Horn operation, it is a subsidiary of Celotex; isn't it?

A. That is correct.

Q. And who was your contact at Big Horn?

A. I didn't have any contact at Big Horn.

Q. When you wanted to find out something from Big Horn, you called Don Miller, and he found it out for you; didn't he?

A. If I remember correctly, sir, he knew ahead of time; he didn't have to find it out.

Q. Oh, he kept tabs on their prices?

[5491] A. They directed the pricing at Big Horn after they acquired it.

Q. I understand.

A. Yes.

Q. Celotex directed the pricing of Big Horn?

A That is my understanding; yes.

Q. Now, this says, "Plywood Supply Company, Seattle, two dollars discount by C.M." What does that mean?

A. I would take it that means credit memo.

Q. Then there is a "No" with an exclamation mark; right?

A. Right.

Q. Then it says, "Pay 'N Pan stores advertising a very small markup, one dealer price;" then it says, "Confirm Celotex sells this——"

A. "Account."

Q. "—account ships—" is that "skips"? I can't read that.

A. I can't read mine, either.

Q. That is your handwriting, isn't it?

A. It looks like "ships." Yes, it is my handwriting.

Q. Or "ships," meaning to send the wallboard. "Ships, August 50.50". That is what it is. Next statement——

A. "No deals of any kind in U.S.A."

Q. Where did you get that information from?

[5492] A. Well, that is not my handwriting, so I don't know where it came from.

Q. Those are your initials, there, sir.

A. The handwriting is mine. The other is lettered.

Q. Is that Mr. Sikes' handwriting?

A. It could be.

Q. And according to this, then, "In this conversation with Celotex, I was advised that there were no deals of any kind in the U. S. A. at this time;" is that verification?

A. Yes.

Q. It is?

A. Yes, it is verification.

• • • • •

Q. Now, I ask you again, sir, in these conversations which you had with your—by the way, Mr. Sikes had these [5943] conversations, too, didn't he?

A. Yes.

Q. And Mr. McCaskill had these conversations?

A. Yes.

Q. And Mr. Fatz had these conversations?

A. Yes.

• • • • •

[5494] Mr. FRICANO: May the witness have Government Exhibit 41, please.

By Mr. FRICANO:

Q. Do you have that, sir?

A. Yes, I do.

Q. Can you identify that?

A. Yes. That's a memorandum to Mr. Sikes dated January 6, 1966, from Mr. P. J. Kowal in the Southwest Region. Subject: Alamo Supply Company.

Q. That's all right, sir. This is not in evidence yet.

Mr. FRICANO. I offer the exhibit.

Mr. MALLIN. No objection.

The COURT. It is admitted.

[Government Exhibit No. 41 was received in evidence.]

By Mr. FRICANO:

Q. In the middle of that page is your handwriting; isn't it? Oh, excuse me, Mr. Sikes'. It says, "ALM. Please note and return" at the top of the page.

Is it hidden underneath that piece of paper?

A. It is hidden underneath the paper. Yes, I see it.

[5495] That's right. It is in his initials.

Q. At the bottom there is another note to you—is there not—to Mr. Sikes?

A. Yes.

Q. Now that says: "Discussed this with B. E." with a "1" and a circle; does it not?

•

A. Right.

Q. And it says: "He will check and advise as to current price since attached list was dated 12/18/65."

Now, do the initials "B. E." with the circle "1" mean anything to you?

A. I would assume that would be Bob Evans.

Q. Of United States Gypsum?

A. United States Gypsum Company. According to my code, my shorthand.

Q. And this is a situation where Mr. Sikes was advising you that he had been in contact with Mr. Evans of United States Gypsum, and Mr. Evans was going to find out what the story was and report back; correct?

A. That is correct.

Q. And that was with respect to an entire price sheet for Texas; was it not?

A. A price sheet of the dealer's, the Alamo Supply Company.

Q. And they were trying to find out why Alamo was [5496] allegedly selling at prices which were not then in existence? I mean lower prices that were presently in existence. Is that correct?

A. That's right.

• • • • •

[5500] Q. Just one more along this line. When the initials "K. A." appear with a "2" and a checkmark on your reports of competition, does that indicate a check with Ken Atwell of National Gypsum?

A. Yes.

[5501] By Mr. FRICANO:

Q. And when there is one with a circle, with a check mark, with a "B. W.," that would be Bud Weiser of United States Gypsum, would it not?

A. I would guess so. I said I didn't know Bud Weiser, so I couldn't answer that for sure.

Q. And when we see "1" on some of your handwritten notes, circled with the letter "G" next to it, that would be Bob Gimlin from United States Gypsum, would it not?

A. Is this in my handwriting?

Q. Yes, sir.

A. I would assume that is what it means.

Q. And when we read from an exhibit, inquiry from No. "1" with a circle, "J.O.B.," that would be Joe O'Brien from United States Gypsum, would it not?

A. Yes.

• • • • •

[5502] Q. Did you from time to time either directly or through your subordinates call Johns-Manville, Mr. Marian, in an attempt to straighten out competitive problems that Johns-Manville was creating in the marketplace?

A. You are not speaking of any particular period of time?

Q. While you were at Georgia-Pacific from the period charged in the indictment, the period of the indictment, 1960 through December of 1969.

A. There may have been some at the beginning of the sales agreement, the purchase agreement I should probably refer to it as, whereby the competitor, the purchaser, became a competitor by purchasing board from us and selling it on their own.

Q. But didn't you from time to time, when this happened, contact Johns-Manville in an attempt to eliminate the problem?

A. That is a long time ago. I don't recall any particular incident. I may have.

• • • • •

[5503] Mr. FRICANO. May the witness have 1214, please.

[An exhibit is handed to the witness.]

The WITNESS. Thank you.

By Mr. FRICANO:

Q. Can you identify these documents?

A. Yes.

Q. The top one is in whose handwriting?

A. The top one is my handwriting.

Q. And the bottom has some handwriting on it. Do you recognize it?

A. Well, some of it I do, and some of it I don't.

Q. How about the writing at the bottom, the bold handwriting with the initial "F"?

A. The bold handwriting appears to be that of Mr. Fatz.

Q. Fatz.

Mr. FRICANO. I offer this exhibit.

Mr. MALLIN. No objection at this time.

The COURT. Admitted.

[Government Exhibit No. 1214 was received in evidence.]

[5504] By Mr. FRICANO:

Q. Now, this deals with Johns-Manville, does it not, your customer?

A. Yes, sir.

Q. And the bottom one says—this is from MacLeod to McCaskill in 1967—"Johns-Manville is quoting 5 per cent 15-day terms in all areas per TWX read to me by one of their district managers."

Now, your buckslip says—it is directed to somebody by the name of Ed.

A. Yes.

Q. Who is that?

A. I would judge that is Mr. Fatz.

Q. All right. It says, "Ed. O.K. Did I suggest that you tell Joe Kelly about——"

Who is Joe Kelly?

A. Joe Kelly was our credit manager.

Q. "Did I suggest you tell Joe Kelly about this and have him contact JM Credit Department. Please do."

Did he do it?

A. Well, there is evidence here that he did by his comment.

Q. At the bottom of the second page in Mr. Fatz handwriting it states: "Discussed with J. A. Marian. He will follow with J-M Credit Department."

[5505] Does that refresh your recollection now, Mr. Meyer, as to your relationship with Johns-Manville with respect to getting them to do things to solve competitive problems?

A. Well, yes, and no. Yes in that that was the case here, perhaps, but this was a credit matter, and I mentioned before that I didn't have anything to do with the credit matters, as you can see from the notation that this was passed along to the two credit departments, and it was out of the hands of the sales department.

• • • • •

[5510] Q. All right, sir.

You have before you Exhibit 445, 446, 447 and 448 and if you can identify them, I would like to offer them in evidence.

A. Yes, I can identify them.

Q. What are they, sir?

A. My calendar notes.

Q. For what years?

A. '65, '66, '67 and '68.

Mr. FRICANO. I offer the exhibits.

The COURT. Hearing no objection, they are admitted.

[Government Exhibit Nos. 445, 446, 447 and 448 were received in evidence.]

By Mr. FRICANO:

Q. Now from time to time in your calendar, in your [5511] desk calendar, you made entries of your telephone conversations, did you not?

A. Yes, sir.

Q. And from time to time when you talked to your competitors over the telephone you, either your calling them or their calling you, you made little notations of it, did you not?

A. Yes, sir.

Q. You didn't always do this as a matter of course, though, did you?

A. Pretty routinely, yes.

Q. Now did you use any kind of a code system for whether the call was completed or whether the call wasn't completed and did you not even use Japanese from time to time in your desk calendars?

A. I did.

• • • • •

[5513] Q. Now, you have a check mark there in front of Mr. Gimlin's name, do you not?

A. Right.

Q. What does that mean?

A. That would mean to me that I completed that call.

Q. That was a completed telephone call, correct?

A. That is right.

Q. Now looking down the page you will see a double check mark at the bottom, do you not, and some writing next to it?
A. That is right.
Q. What does that mean?
A. Probably the same as the single check-mark in this case, because this has to do with contacting a garage about my car.
Q. That is not a competitor contact?
A. Hardly.
Q. If we look through your calendars there from time to time we will see a circle like that. What does that mean?

[5514] A. That would mean that I was not able to establish contact on that day.
Q. Then we see a circle with a line through it. What does that mean?
A. Well, I honestly don't remember.
Q. That you didn't complete the call at that time?
A. It could mean that, yes. I would judge it would mean that, but that is purely speculation.
Q. How about an X, did that show an uncompleted call?
A. I would say yes. I will say that is what it meant, uncompleted on that day.
Q. Now from time to time we see a red inkline. What does that mean?
A. That I had a red pen in my hand at the time.
Q. Touche.
That is a terrible put-down, Mr. Meyer.
A. I am sorry. I didn't mean to be facetious, but that is the way it came out.
The COURT. You are under oath.
By Mr. FRICANO:
Q. Mr. Meyer, let me just ask you a question. Doesn't a red line mean more than that happens to be the color? Doesn't that signify an incoming call and a blue or black line means an outgoing call?
A. I recall at some period of time I made that statement, [5515] and I wouldn't say it applied universally because I was not that consistent.
Q. But at one time it did?
A. Yes.
Q. If we see that "OT", what does that mean?

A. Out of town.
Q. If we see "WCB", what does that mean?
A. Will call back.
Q. Let's see if we can make a little division on here. You have to bear with me on this one.
Can you pronounce that?
A. Suvoli.
Q. What does that mean?
Does that mean Wednesday in Japanese?
A. It is a day of the week. I know that.
Q. What about this one? [indicating denwa]
A. Telephone.
Q. Is that Japanese?
A. Telephone.
Q. That means a telephone call?
A. It means telephone. I used it for a telephone call.
Q. What does that mean? [Indicating hito]
A. That means a conversation and I used it in connection with a conference in the office.

[5516] Q. Face-to-face?
A. Face-to-face.
Q. Through your desk calendars these signals appear continuously, do they not?
A. Right.

[5517] Q. And, from time to time, your code letters of one for United States Gypsum, two for National Gypsum, three, four, and five signifying your other competitors—is that correct?
A. That's right. Mr. Fricano, could I be permitted to explain the Japanese?
The COURT. Yes.
Mr. FRICANO. By all means.
The COURT. I am very curious.
The WITNESS. Well, as I testified to this at the Grand Jury, namely that, at this time, I was interested in—hopeful of making a trip to the Orient, and I was seeking to learn the ordinary conversational Japanese, and, as a matter of practice, I was using these terms, like days of the week and telephone and conference and things like that, and using that in place of English to become familiar with it. It had no other significance.

By Mr. FRICANO:

Q. Well, if someone didn't take Japanese, they wouldn't know that from looking at your calendar, though; would they?

A. No, hardly.

Q. By the way, did you take that trip to Japan?

A. No. I am sorry to say I didn't.

[5518] Q. Oh, a lot of wasted effort, then?

A. It was.

Q. All right. Now, if you had something like this, if you look at your calendar entry for July 27, 19——

The COURT. I have to protest. It wasn't wasted effort, Mr. Meyer. They say that anticipation is greater than realization.

The WITNESS. Thank you, sir.

Mr. FRICANO. I am sorry, sir.

The COURT. Go ahead.

• • • • •

[5520] Q. Now, on the same day, if you look down, you will see a double checkmark and the word, "Watt." Who is that?

A. Wait until I find it, sir. On the same day?

Q. The same—July 28. Isn't that on the same day? Maybe I have the wrong day. July 28, 1966, the lefthand column.

A. Oh, here it is. Okay.

Q. Now, what does that mean?

A. It appears to me, there, that I called Mr. Watt.

Q. A. J. Watt of United States Gypsum?

A. Yes, sir.

Q. The next day, the 29th, we have one—that one. Now, we have the bottom one in the right-hand column. Now, [5521] this is a little different. This is an X with a zero on top of it, and then we have the name, Atwell.

A. Yes, sir.

Q. What does that mean?

A. Well, I don't attach any significance. I think you had one in your other illustration of a circle which was crossed out; right?

Q. Yes.

A. And I think that is the same indication here, and that Atwell, of course, would refer to Atwell of National Gypsum Company.

Q. All right, sir.

A. The peculiar placement of the circle wouldn't have any significance.

Q. Just one last series of questions, if I may. When Republic Gypsum—maybe I asked you this question.

When Republic Gypsum came on stream in 1964, was this a subject for discussion at the Gypsum Association meetings?

Mr. DELONG. Objected to as not covered by the offer—far beyond it.

The COURT. There is nothing in the offer about that.

Mr. FRICANO. No, but I said I was going to go back in point of time, depending on what I established.

[5522] The COURT. Well, not on non—not on unrelated subjects.

Mr. FRICANO. Well, I had in my outline, Your Honor, if I didn't read it——

The COURT. You didn't give us your outline. Do you really have any objection to this, Mr. DeLone?

Mr. DELONE. Well, simply because it is so far removed from the time with which we are concerned.

The COURT. Let him answer yes or no, and that will conclude it.

The WITNESS. Would you mind rephrasing the question? I lost a bit of it.

By Mr. FRICANO:

Q. When United States—excuse me. I will withdraw that.

When Republic Gypsum came on stream, 1964, in or about that tin , '63, '64, or was about to come on stream, did you not have discussions concerning the new competitive problem that it would pose in the southwest, at Gypsum Association meetings?

A. No, sir. I don't recall any such conversation at the association meeting.

Q. Did you not testify——

Mr. DeLone. Well, I thought, Your [5523] Honor, you allowed him one question.

The Court. Well, I will allow this.

Go ahead.

By Mr. Fricano:

Q. Did you not testify to—at 1:00 p.m.—I don't have a date—at page 5839—in response to these questions, the following answers?

This is your testimony before the Grand Jury, Mr. Meyer.

Question. Well, is it fair to state when there were new innovations in the industry, for example, as I understand—and you correct me if I am wrong—back in about 1964, when Republic Gypsum came on stream with its plant in Texas, that it started trucking as a matter of course. Would that be the type of thing that would be the common subject of discussion at these meetings?

Answer. Was one of the industry's headache problems?

Question. That is what I mean.

Answer. Yes, because we are not equipped to do this.

The Court. That is not exactly the same question; is it? That is a substantially different [5524] inquiry that you made in the Grand Jury from the one you made here at trial.

Mr. Fricano. If I did, I will withdraw it.

The Court. Well, here, at trial, you asked the witness, "Did you discuss Republic coming on stream," and he said he can't remember that. Now, this is directed toward a business technique, and Republic was almost incidental to it.

Mr. Fricano. No.

The Court. I don't want to argue with you.

Mr. Fricano. I am sorry, Your Honor. I don't want to argue, either. I am sorry. I will withdraw it.

• • • • •

[5526] CROSS-EXAMINATION

By Mr. Mallin:

Q. Mr. Meyer, I would like to get right down to it. Did you ever make an agreement with any competitor to fix or maintain prices?

A. No, I did not.

Q. Did you ever make an agreement with any competitor to fix or maintain any credit term or any other terms and conditions of sale?

A. I did not.

Q. Now, in that context, I would like to go over a couple of these matters that were brought up by Mr. Fricano today.

With respect to your shorthand method of keeping your desk calendars and other notes, did I gather correctly——

The Court. Now, he is not going to be able to answer that. What you gathered, he can't know.

Will you phrase the question correctly?

Mr. Mallin. Yes. I am going to ask whether I am correct.

By Mr. Mallin:

Q. Is it correct, Mr. Meyer, that this was merely [5527] a shorthand way of you keeping notes during the course of your business?

A. That is right, and correct.

Q. This was a way of avoiding writing out the full names or the full substance of a particular occurrence, in a shorthand way?

A. Yes.

[5528] By Mr. Mallin:

Q. And did you use those type of shorthand expressions in connection with your notes on other subjects besides vertification calls?

A. Well, I certainly did in connection • • •

Mr. Fricano. Objection It is irrelevant.

The Court. Oh, I think it is relevant. Maybe he did an automobile inquiry of some kind.

Mr. Fricano. That's right. I withdraw the objection. You are right, Your Honor.

The Witness. Yes, I did. And that was evidenced by that. And you will find in the calendars other double check marks on conversations with our sales people in the field and so on.

By Mr. Mallin:

Q. Yes.

Well, if you talked to someone in Georgia-Pacific's own organization you used this same system of shorthand notes about those kind of conversations?

A. That's right. For instance, you will find that such conversation is listed in that Japanese, H-I-T-O, which meant "conference."

Q. So this shorthand system was not in any way unique to the verification practice that you engaged in?

A. Not so far as I am concerned.

[5529] Q. And Mr. Meyer, in using those shorthand notes, were you trying to hide anything?

A. I think I already stated I was not.

Q. Now I would like to turn to the year 1969.

The COURT. Mr. Meyer, were you married during this period?

The WITNESS. Yes.

The COURT. If you got a call from your wife, would you write that in red or blue?

The WITNESS. I don't remember, sir.

By Mr. MALLIN:

Q. In 1969, Mr. Meyer, is it correct that you no longer had any responsibility for price verification after February of 1969?

A. That is correct.

Q. And as a matter of fact, you were not even physically on the Georgia-Pacific premises after July of 1969; is that correct?

A. Not as an employee in that sense, no. I wasn't occupying my office or anything of that kind. I might have been there on occasion, yes.

Q. You may have come by to visit, but did you come to work day-by-day as an employee?

A. No, I didn't.

Q. You were paid during that period. Your retirement [5530] did not become effective until the end of the year; is that correct?

A. That's right.

Q. But as a matter of what was actually happening during that period from July to the end of the year, you were not physically present as a regular matter or engaging in employment activities for Georgia-Pacific; is that correct?

A. That is correct.

Q. And then during the period of May and some part of June, were you physically present at the Georgia-Pacific offices?

A. Yes. But not at all times. Not the entire day.

Q. Maybe you could describe for the jury what the situation was at the time with respect to your employment with Georgia-Pacific.

A. Well, yes.

We were—I was vacationing in Florida in May, about the middle of May. And while there my wife had a heart attack, which of course prevented us from returning as scheduled. And we remained in Florida for some time. I don't remember the exact time we returned, but probably around about the middle of June. And from that time on, for some time, the company graciously gave me permission to see to her comfort and care in the mornings and leave a little earlier in the afternoon, and so on.

[5531] Q. And is it correct it was in about that time, June, that Mr. Burch came on the scene at Georgia-Pacific as the General Sales Manager?

A. That is correct.

Q. And at the time that he came on the scene, what was your job and function?

A. When he came on the scene?

Q. Yes.

A. Oh, special. I was on special. I had been placed on special assignment by Mr. McCaskill in the forepart of the year, in February, as a matter of fact. And then this incident that I just described took place. And of course, actually, you might say I didn't have any assignment. I was there, but I was there part time. I would answer questions and so forth. And I don't remember what I did, but I didn't have any routine responsibilities as such.

Q. You had this special assignment during that period?

A. That's right.

Q. And your responsibilities did not include any price verification practice at that time?

A. No, sir, it did not.

Q. Do you recall making any price verification call or receiving any price verification call in the year 1969?

A. Well, I don't recall any specifics. It is very possible in the early part of the year that I did, because [5532] of the habit of people calling me. I wouldn't be originating them, because other people had that responsibility. But others might call me, not knowing that I was on a special assignment.

Q. You say "might." Do you recall?

A. No, I do not.

Q. And since you left, your official leaving at the end of the year, even though you hadn't been there physically for some time, the end of '69, from that period on you haven't been involved in the gypsum business; have you?

A. Not in any way at all.

Q. Mr. Meyer, with respect to price verification practice where you made calls to verify a price or other competitive practice with a competitor, did you do that in the circumstance where you had received a report from the Georgia-Pacific organization of a lower price or a competitive condition out in the marketplace?

A. That is right. That is where those things originated.

Q. And the information came to you from Georgia-Pacific employees who had gotten it from customers?

A. Correct.

Q. And the purpose of the customer advising of the lower price was so that that customer could get a lower price?

A. From us, to meet a competitive price.

Q. Yes.

[5533] A. That he allegedly received from someone else.

Q. What I mean is: The customer would advise the Georgia-Pacific individual of a lower price of a competitor and requested Georgia-Pacific to give a lower price?

A. That's right.

Q. And as a result of that request by the customer coming to you through the organization, you sometimes made a verification call with a competitor?

A. Yes.

Q. And when you made that call, did you make it to verify the existence of a lower offered price or other practice that had been made or offered before the time that you made your telephone call to the competitor to verify it?

A. Yes.

Q. And you made that verification call to find out the truth; is that it?

A. That's right.

• • • • •

RE-INDIRECT EXAMINATION

[5547] Q. Now with respect to competitive information, as you use the terminology, price verifications, did you, from time to time throughout the period about 1960 through February, 1969, when you say you stopped, have price verifications with Mr. Andy Watt?

Mr. BARTLIT. Outside the scope of the cross-examination, Your Honor.

The COURT. There is no cross-examination on that subject at all.

Mr. FRICANO. Mr. Keck went into the time periods and the tenures for each of the individuals who were read off the list.

The COURT. Go ahead. You may ask it.

Mr. KECK. Those were names he gave on direct examination.

The COURT. But you gave terminal dates and there could be an inference from that.

You may ask the question.

By Mr. FRICANO:

Q. Did you not, from time to time, have such price verifications with Mr. Watt?

A. I think my—yes, my calendar report shows that.

• • • • •

[5548] Q. You received reports from Mr. Meyer, just as you gave reports to Mr. McCaskill? I mean Mr. Sikes.

A. Yes.

Q. Monthly reports?

A. Yes.

Q. Were they reliable reports?

[5549] A. Certainly I thought they were, or I wouldn't have had the man in my employ.

• • • • •

Q. Now you testified that you had contact with individuals from Republic, Grand Rapids and Dierks. They were single plant producers, were they not?

A. At that time they were.

Q. Were your contacts very frequent with these people?

A. I don't remember, really.

Q. Was it fair to say——

A. Over what period of time?

Q. 1960 through February, 1969.

A. I would say they were not frequent.

Q. By comparison to the calls which you made and received from your major competitors who sold nationally, as you did?

A. That is correct.

• • • • •

[5580] OLIVER EUGENE BURCH, resumed.

RE-CROSS-EXAMINATION.

• • • • •

[5581] • • •

By Mr. MELLOTT:

Q. Is it also indicated in this exhibit that the published price list set forth therein applies to the area encompassing Pittsburgh?

A. Yes, it does, sir.

Q. And what does it indicate as the published price under the published price list for one-half inch wallboard to be effective in the Pittsburgh area September 16, 1968?

A. $48.25 per thousand square feet.

Q. All right, sir.

A. Excuse me, there is one other category priced on this. That would be truckloads in 20,000 pounds at $51.25 per thousand square feet.

Q. All right, sir. Now, referring back to the Government Exhibit 1354 that I read a moment ago. That is dated September 12, 1968.

The sentence, one of the sentences I read said that the "branches should follow our pricing in terms of that date since

all competitors are almost to the letter at our new levels." Is that correct?

[5582] A. Yes, sir.

Q. Now, your published price on one-half inch wallboard in the Pittsburgh area to be effective September 16, 1968, was $48.50 per thousand; is that correct?

A. Yes, sir, that's correct.

Q. And the published price on the published price list of USG and Celotex, GP Exhibits 56 and 57 respectively, was almost to that level? In other words, $48.25 per thousand square feet; is that correct?

A. Yes, sir.

By Mr. MELLOTT:

Q. Now, Mr. Burch, would you look at GP Exhibit 54, please.

A. Yes, sir.

Q. Is that document the same document that is attached as the second document to Government Exhibit 5006?

A. Yes, sir, it is.

Q. Would you tell me what that document is, please?

A. This is a Georgia-Pacific internal price list covering the states of Connecticut, New Jersey and Pennsylvania, dated 9/16/68, revised.

Q. Does it indicate on it the extent of the distribution of that list?

A. Yes, it does, sir.

Q. And where does that appear?

A. On the lower right-hand corner.

[5583] Q. Does that also appear on the second sheet of Government Exhibit 5006?

A. Yes, it does.

Q. Does that indicate that that document was ever sent to your customers or to the trade?

A. No, it was not.

Q. It was strictly internal distribution; was it not?

A. Yes, it was.

Q. In response to what you had learned in the field as to the published price list of your competitors; it that correct?

A. That's correct.

Q. Would that document GP Exhibit 54—which the Government has attached to another document, or at least it was

attached in the exhibit shown to you—have been sent to the trade?

A. No, sir, it would not.

[5584] Q. Would it have been attached by Georgia-Pacific——

A. No, sir.

Q. [continuing]. To the document which the Government has shown to you as the front page of 5006?

A. No, sir. It would not.

Q. Now, Mr. Burch, yesterday, on voir dire, with respect to a chart which was identified, G-P Exhibit 100, you were asked some questions by Mr. Fricano after he showed you Government Exhibit 5006, the two sheets, and I will—do you remember that questioning?

A. I remember the questioning; yes.

Q. Now, I would like to refer to that and ask you whether you now desire to change that testimony.

"By Mr. FRICANO:

Question. Doesn't the blue line say published list price, Mr. Burch?

Answer. Yes, sir, $48.50.

Question. Now, you are wrong, aren't you, Mr. Burch, that that was the price of $48.50?

Have you seen——

I am on page 5364, still continuing with the questioning.

Have you seen Georgia-Pacific Exhibit—not an exhibit, but the Georgia-Pacific price document [5585] dated July 31, 1968, rescinding that price?

Answer. No. I would like to see it.

Question. I am going to show it to you.

Now, tell us what the price is.

The COURT. Is that in evidence, Mr. Fricano?

Mr. FRICANO. No, it is just for purposes of refreshment of recollection at this point, Your Honor. I will give it a number, GX 5006.

The WITNESS. This goes to the states of Connecticut, New Jersey and Pennsylvania, and in the——

I think you said "county." It says "country," here.

—and in the country of Allegheny, and it announces or refers to our letter of July 12, 1968, which is this announcement, and does rescind it.

By Mr. FRICANO:

Question. You are wrong, aren't you, Mr. Burch?

Answer. It would appear."

Mr. Burch, do you desire to change that testimony?

[5586] A. Yes, I do.

Q. And what is your present testimony?

Does that document, Government Exhibit 5006, refresh your recollection to the point of indicating that G–P Exhibit 461 or 461A, with reference to the $48.50 published price on one-half-inch regular wallboard in the Pittsburgh region was rescinded publicly by Georgia-Pacific?

A. My memory is refreshed, and the $48.50 price that was published to the trade was never rescinded by Georgia-Pacific in an announcement to the trade.

Q. Now, why have you changed your testimony in this regard? What has refreshed your recollection to the extent that you now state that your prior testimony in that regard was incorrect?

A. I have reviewed these documents, and it has refreshed my recollection, and it is impossible that this exhibit could have gone to the trade.

Q. Which exhibit are you referring to when you say "this exhibit"?

A. Government Exhibit 5006.

Q. Were you confused when that exhibit was handed to you, stapled together in the form that it is?

A. Yes. I looked at the cover letter, and then I looked at the zone that it covered and the half-inch price, and thought that an exhibit handed to me would have been [5587] an exhibit from our records, in the condition that it was handed to me, and that is just not true. This exhibit is—this list on the back would never have gone to the trade, and this list on the cover letter did not even demand that a list be attached, nor would one have been attached to it, and I just failed to notice that in the confusion of the moment.

The COURT. May I see that cover letter, please?

By Mr. MELLOTT:

Q. Now, Mr. Burch——

The COURT. Just a minute, please.

Mr. MELLOTT. Oh, excuse me.

The COURT. Is it your testimony that the letter dated July 31, 1968, from the Gypsum Division "To our customers," did not go out, to your knowledge?

The WITNESS. That is correct, sir.

The COURT. Here you are, Mr. Grainer.

By Mr. MELLOTT:

Q. In any event, it did not go to the point of rescinding the published price list for the eastern region of the United States; isn't that correct?

A. My testimony is that we did not rescind our announcement in the Pittsburgh area, as indicated by this cover letter.

[5588] The COURT. All right. Now, where did that cover letter come from?

Mr. FRICANO. The files of Georgia-Pacific.

The WITNESS. Which files, sir?

The COURT. Wait.

Mr. MELLOTT. I acknowledge both of those documents were produced from the files of Georgia-Pacific, Your Honor, at independent times, six months apart.

The COURT. I only asked about one. I want to know where that came from, and I am told it came from the files of Georgia-Pacific.

Mr. MELLOTT. It is our position it did not rescind the published price list in the eastern part of the United States, Your Honor, and——

The COURT. Well, you can't testify, Mr. Mellott.

Mr. MELLOTT. No, but there are documents that are in evidence now that show that.

The COURT. All right.

[5609] • • •

ROBERT SIKES called as a witness, and having been sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. FRICANO:

• • • • •

[5610] Q. Were you at one time employed by the Bestwall Company prior to its acquisition by Georgia-Pacific?

A. Yes, sir.

Q. Would you tell us the period of time that you were employed by Bestwall Company?

A. Bestwall Company, I believe, was formed in 1956 as a spin-off of sort from Certain-teed, and I was employed by Bestwall from '56 to April, 1965, when they were acquired by Georgia-Pacific. I believe that's correct.

Q. And were you employed subsequently, then, by Georgia-Pacific?

A. That's correct

[5611] By Mr. FRICANO:

Q. And when did you leave their employ?

A. March 17, 1967.

Q. Now, during this entire time period did you have the title of Pricing Administrator?

A. The greater portion of that period.

Q. What were your duties and responsibilities as a pricing administrator?

A. Prepare price lists.

Q. Disseminate them to the trade?

A. That is correct.

Q. Did you from time to time also send them to your competitors pursuant to their requests?

A. Do you mean the trade letters?

Q. Yes.

A. Upon their request I would do that.

Q. And from time to time did they also request gypsum wallboard price sheets from you?

The COURT. That's what you already asked.

Mr. FRICANO. I am sorry.

By Mr. FRICANO:

Q. The other way around. I reversed myself. From time to time did you request such price lists from your competitors?

[5612] A. I don't recall, sir. We got ours from the field.

Q. But on the other hand, you did send yours to them?

A. Upon request.

Q. During the time period now from 1960 to the time when you left the employ of Georgia-Pacific in 1967, did you engage in the exchange of prices, terms and conditions of sale and other matters relating to the sale of gypsum wallboard with your competitors?

A. In what way, sir?

Q. Well, did you from time to time discuss the prices of gypsum wallboard over the telephone with your competitors?

A. Price verification only.

Q. What do you mean by that?

A. To call a competitor up and ask him a specific question. For example, "Do you have an extra 5 per cent with the Jones Lumber Company? Yes or no?"

Q. You never got into a discussion with your competitor on whether he had a 5 per cent or a 2 per cent, or something less than that or more than that?

A. No. Specific questions, specific discount.

• • • • •

[5613] Q. What was your purpose on price verification as you described it, Mr. Sikes?

A. Well, we didn't want to approve a fictitious competitive situation.

Q. Any other purpose?

A. To guard against price erosion.

Q. Now, how often did you . . . Well, first of all, let's find out with whom you had the so-called price verifications.

Did you have any with anyone from National Gypsum?

A. Yes, sir.

Q. Who?

A. Ken Atwell.

Q. Anyone else from National Gypsum?

A. Earl Kroth. And occasionally—I believe his name was Dan Webster. But very seldom.

Q. With whom did you have them from United States Gypsum?

A. Joe O'Brien.

Q. How about Bud Weiser?

A. Occasionally. I recall Bob Evans as the other one.

Q. Bob Evans. With whom from Celotex?

[5614] A. I believe his name was Miller.

Q. Don Miller?

A. Don Miller.

Q. Kaiser?

A. I'd have little contact with Kaiser.

Q. Jim Hague?

A. No, sir.

Q. Costa?

A. No, sir.

Q. How about Flintkote?

A. Warren Malhiot.

Q. How about Johns-Manville?

A. Joe Marian. J–M was a customer of Bestwall.

Q. Did you also have these price verifications with Mr. Marian?

A. He would call me to ask on a specific competitive situation.

Q. Where did you have these contacts? Were they face-to-face in person, or how?

A. By phone.

[5615] Q. Did you keep a record, a written record of your telephone calls with your competitors?

A. No, sir.

Q. Did you from time to time, however, make little notes on TWX's, and other internal documents of Georgia-Pacific, which reflect these contacts with competitors?

A. Yes.

• • • • •

Q. How often did you have these conversations with your competitors on a daily basis? How often?

[5616] A. Well, this figure is only guesswork. I'd say maybe——

Mr. MALLIN. I object to the guess.

By Mr. FRICANO:

Q. Your best recollection.

The COURT. Give your best approximation if you can.

The WITNESS. This is too long ago. Once or twice maybe, a day.

• • • • •

Q. Did it ever increase in intensity on a daily basis?
A. It could have increased when the market was unstable.
Q. Could have? Did it?
A. I believe it did.

• • • • •

[5618] Q. Mr. Sikes, do you know, or did you know, while you were at Bestwall and Georgia-Pacific, a man by the name of Bob Smith?
A. Yes, I did.
Q. Who is Mr. Smith?
A. He was in the legal department, secretary to the company.
Q. Did Mr. Smith, the lawyer, know what you were doing with respect to your telephone calls to competitors?
Mr. MALLIN. Objection.
The COURT. You can't ask him if he knew. You can ask him if he told him or they discussed it in any way. That is a pretty technical objection.

By Mr. FRICANO.

Q. Did you ever tell Mr. Smith what you were doing?
A. No.
Q. Did Mr. Smith ever ask you what you were doing?
A. Not that I can recall.
Q. His initials appeared in the lower right-hand corner on the report of competition; did they not?
A. That is correct.
Q. Did he do this before or after you had made up your mind as to what you were going to do?

[5619] A. He did that after we set the commitment up.
Q. Did Mr. Smith ever see any TWX's, teletypes, or internal memoranda of any kind, that had your handwritten notes on them, which evidenced your contacts with competitors?
Mr. MALLIN. Objection.

The COURT. If you know, say so. If you don't know, say so.
The WITNESS. I can't recall.

By Mr. FRICANO:

Q. Did you ever show him any of those documents that had your handwritten notes on, showing contacts with competitors?
A. I can't recall any instance.

• • • • •

Mr. FRICANO. First, may the witness have 713, please?

By Mr. FRICANO:

Q. There it is, Mr. Sikes, right in front of you. This document is in evidence. I would like for you to identify some of the handwriting, please.
This is a request for a price exception on gypsum products for Georgia-Pacific; is it not?
A. Yes, sir.

[5620] Q. And it is dated February 3, '66; is it not?
A. Yes, sir.
Q. And it has got your handwriting on it; does it not?
A. That is correct.
Q. Now, isn't it a fact, Mr. Sikes, as you read this document, that, when you called Warren Hill of Celotex to find out about this particular situation, you had a far-ranging discussion in which you found out that Mr. Walters, the president of Celotex, had instructed Mr. Hildebrand, the president of his subsidiary corporation, to sell only on the basis of the list prices?
A. That is what is shown on the document here.
Q. Now, I ask you again, Mr. Sikes, isn't it the fact that your conversations that you have labeled price verifications, were, in fact, far-ranging discussions relating to prices and other competitive matters?
A. I can't say that, sir.

• • • • •

Q. Do you have 61, sir? Do you have 61? You may [5621] look at it.
A. Yes.
Q. Now, this is another teletype which was sent from the field to you, and it is dated June 20, 1966; is it not?
A. Yes, sir.

Q. This is in evidence. Now, this is another report of a competitive situation concerning your account, Hitzelberger; is it not, correct?

A. Yes, sir.

Q. And, in this particular instance, Mr. Hitzelberger, your customer, said he needed a lower price from you because his other competitors, his dealers that he was competing against in the sale of wallboard, were getting lower prices from USG, Celotex, and Grand Rapids; isn't that correct?

A. Yes, sir.

Q. And isn't it also correct that, in this particular instance, you called all three of these companies and found out that it wasn't true, that there was no deviation to their customers, and, as a consequence, you didn't give a discount to your customer?

A. That's correct.

Q. And don't you describe this as indirect competition Mr. Sikes?

[5622] A. It would be, due to the fact that the price was offered to other customers in that marketplace.

[5623] By Mr. FRICANO:

Q. Not your customer?

A. That is correct.

Q. Is that a verification, Mr. Sikes?

A. Yes, sir.

Q. Was the previous one when you found out from Mr. Hill about what two different presidents of two different corporations were going to do, was that a verification, too?

A. What document is that?

Q. That was the previous one.

Mr. KECK. Objection, Your Honor, as misstating the notes on the prior document. I think the question is improper. It speaks in the past tense, not future.

Mr. FRICANO. Let me ask the witness whether I misstated it. Exhibit 713, if he may have that.

The COURT. I'm interpreting this as——

Mr. KECK. Yes.

The COURT. —a rephasing of your question.

By Mr. FRICANO:

Q. That is in your handwriting, no with two [5624] exclamation marks?

A. That is correct.

Q. Underneath it says Warren Hill.

Who is Warren Hill?

A. I believe he was with Celotex.

Q. Right.

And underneath that it says, "Walters instructed Hildebrand to sell on basis of list price only."

Who is Mr. Walters? Do you recall?

A. I don't recall at this time.

Q. There is a stipulation between counsel for both sides as to who Mr. Walters is.

Mr. MALLIN. I don't think we will find a stipulation on Mr. Walters.

The COURT. Read him what the stipulation is.

Mr. FRICANO. Maybe we don't have it.

Yes. It is J. W. Walter, at this time he was Chairman of the Board of Directors of Celotex Corporation.

• • • • •

[5625] • • •

The COURT. Who is Hildebrand?

The WITNESS. Hildebrand was with Big Horn Gypsum Company.

Mr. FRICANO. According to the stipulation Ed L. Hildebrand was President of Big Horn Gypsum and Big Horn Gypsum Company was a subsidiary of Celotex.

By Mr. FRICANO:

Q. Isn't that correct?

A. If I can revoke that, Hildebrand told me that, because I don't even know Walters.

Q. You spoke directly to Mr. Hildebrand?

A. That is correct.

• • • • •

[5627] Q. With respect to the situation with Big Horn Gypsum, was that a verification?

A. That is this 713?

A. Yes, sir.

A. Yes, sir, it is a call.

Q. All right, sir.

A. To try to verify a competitive situation.

• • • • •

[5630] Q. Do you have that now, 53?

A. Yes, sir.

Q. Now that is also in evidence, and here again is a TWX teletype from Mr. Mole to Western Region, to both you and Mr. A. L. Meyer dated April 27, 1966, reporting on a competitive situation with American Gypsum and Celotex, with your handwriting at the top, is it not?

A. Yes, sir.

[5631] By Mr. FRICANO:

Q. Now, did you call Mr. Miller or someone else at Celotex in order to find out that Celotex took this account from American because American cannot prepay freight—no money, which is what your note says?

Mr. MCSWEENEY. I object to that statement. It doesn't state that, Your Honor.

The WITNESS. I don't know who I talked to.

The COURT. Now, wait. Does the note state what Mr. Fricano says it stated?

The WITNESS. Yes, sir.

The COURT. All right.

Mr. MCSWEENEY. Well, I would ask——

The COURT. All right. Now, the witness said it did. He was asked it, and he says it did.

Go ahead.

Let me see the exhibit.

Now, read me what Mr. Fricano said.

[Question read.]

The COURT. Now, that's exactly what the note says. That ends that discussion.

Mr. MCSWEENEY. I would like to be heard on that.

The COURT. I just read that, and [5632] that's exactly what it says, and you sit down. Sit down.

By Mr. FRICANO:

Q. Do you recall whom you called at Celotex to get this information, sir?

A. No, sir, I don't recall.

Q. Were you asked by Mr. Mole, in the bottom sentence of this document, to check this out before the phones start?

A. That's what it states on this TWX.

• • • • •

Q. Mr. Sikes, please forgive me for diverting you here, but that one document I asked you about, No. 61, which reports on the indirect competition by Hitzelberger, that's document No. 61, that says "No," with a "1" circled, a "4" circled and "5."

Is that your handwriting?

[5633] A. Yes, sir.

Q. What does that mean?

A. It means that the competition did not exist.

Q. Yes, but what about the 1, 4 and 5?

A. It is the—USG is 1. That's the code of A. L. Meyer.

No. 4, I believe, was Celotex, and No. 5 was Grand Rapids Gypsum Company.

Q. Correct. Now, did Mr. Meyer have additional ways of putting things down on paper that people couldn't understand?

A. He used this code, and he had a color code to go with it for his own use.

Q. Could you understand his other code?

A. No, sir. I knew his code on 1, 2, 3, 4.

Q. But not his other code?

A. No, sir.

Q. Now, with respect to 371, which is in front of you, that's also in evidence, that's a report of competition, is it not?

A. Yes, sir.

Q. And down in the lower left-hand corner there is a "1" circled, a "could be" and your initials, is that not correct?

A. Yes, sir.

[5634] Q. Now, the third page of that document, and this one is dated October 2, 1965, will you turn to the green sheet of paper there? That's a note, a typewritten note from A. L. Meyer to Alex McCaskill, is it not?

A. Yes, sir.

Q. All right. Now, your handwriting appears on that, does it not?

A. It looks like mine, the "call Jim Hague."

Q. That's right. Now, does that refresh your recollection that from time to time you also called Mr. Hague at Kaiser Gypsum?

A. I believe that was about the only time.

Q. All right. Now, in connection with this document, it talks about the elimination of applicator allowances in the Portland, Oregon area.

Is that a verification?

A. A. L. Meyer is asking Alex McCaskill for his suggestions.

Q. Pursuant to whose request? Who is Bob G.?

A. It could be Bob Gimlin.

Q. Of United States Gypsum?

A. But it doesn't so state here. It just says "Bob G." That's the only one I know.

Q. Now, is this a verification?

A. Well, it is in the field of verification.

[5635] Q. And if you will turn two more pages or one more page, you will see more handwritten notes, do you not?

And at the bottom of those handwritten notes, you will see another note by you indicating another telephone conversation with Mr. Hague of Kaiser Gypsum, does it not?

A. Yes, sir.

Q. So that's two, right?

A. Yes, sir.

Q. Could there have been more, Mr. Sikes?

A. There could have been, but there was very little contact between me and Jim Hague. I never met him personally.

Q. Had you met personally all the people that you had your telephone conversations with on prices?

A. No, sir.

Q. Now, Mr. Sikes, did you, from time to time, with the men you have identified at your competitor companies, also exchange information with respect to job price protection?

A. When it was a competitive situation.

Q. Now, is it the fact that the most frequent conversations that you had on job price protection were between the times of a price announcement and its effective date?

A. This is—you are talking about job protection?

Q. Yes, sir.

[5636] A. I would say generally, that's true.

Q. And is it also the fact that from time to time, while you were there, between the time of an announcement date and the time of an effective date of a price increase, you had telephone conversations with Mr. Atwell of National Gypsum on job price protection?

A. I don't recall any specific instance.

Q. What's your best recollection?

A. It has been so long ago. It is pretty hard for me to guess.

Q. I don't want you to guess, sir. The Court doesn't want you to guess.

We want your best recollection between the time of an announcement date and the time of an effective date on a price increase, did you from time to time have conversations with Mr. Atwell on job price protection, verification conversations?

The COURT. You can answer that yes, no or I don't know.

The WITNESS. I can't recall.

By Mr. FRICANO:

Q. Yet Mr. Atwell was your principal contact at National Gypsum, is that correct?

A. It was either Mr. Atwell or Earl Kroth.

Q. Now, from time to time, did you at the request—[5637] I may have asked this, at the request of your competitors—I withdraw that for a moment.

From time to time at the request of your competitors, did you seek information on pricing matters from your customer Johns-Manville and then relay that information back to your competitors?

A. I did upon occasion.

Q. Is that a verification?

A. It would be a verification of a competitive situation.

* * * * *

[5643] CROSS-EXAMINATION

By Mr. MALLIN:

Q. Good morning, Mr. Sikes.

With respect to price verification calls that you engaged in, am I correct that when you made the call this resulted from

information that you had received from Georgia-Pacific's own sales organization?

A. That's correct, sir.

The COURT. Mr. Mallin, could you—And I know this is cross-examination, but for the purpose of getting the best advantage from the witness' questions, could you merely ask him why he made the calls rather than suggesting the reason and having him answer, "Yes, sir."

Mr. MALLIN. Well, I think I can move faster the way • • •

The COURT. I know. But I don't know [5644] that the jury is going to get a great amount of light from that practice. You are entitled to do it, and you may do it if you wish. If you want to do it that way, go ahead.

Mr. MALLIN. Your Honor, I only have a few pointed questions on the area.

The COURT. All right, go ahead.

By Mr. MALLIN:

Q. Is it correct that when you made one of these price verification calls it related to a lower price that had been offered or quoted or made by a competitor before the time you made the telephone call?

A. That's correct, sir.

Q. And am I correct that in making these calls you did not—I emphasize the "not"—attempt to fish around for other information; is that correct?

A. That's correct, sir.

Q. And you tried in these price verification calls to conduct them in such a manner as to avoid pressure or collusion with the competitors; isn't that correct?

A. That's correct, sir.

Q. And these reports that came in from the Georgia-Pacific organization that a customer alleged that he had been offered a lower price from a competitor, did those always turn out to be correct?

A. I would say a large percentage of them may have been [5645] correct.

Q. Was there also a significant percentage of them that was incorrect?

Mr. FRICANO. Objection.

The COURT. He is entitled. It is cross-examination.

Go ahead.

The WITNESS. That could be.

By Mr. MALLIN:

Q. Now, at the time that you were with Georgia-Pacific, did you understand that it was the policy of Georgia-Pacific to attempt to avoid price discrimination to customers located in the same trading area?

A. Yes, sir.

Q. And did you in your job function, to the best of your ability, attempt to carry out that policy of nondiscrimination?

A. Yes, sir.

Q. And did you understand that it was the policy of Georgia-Pacific, when faced with a lower price being offered by a competitor, to attempt to meet that competitive price but not to beat it?

A. That is correct, sir.

[5646] Q. So that you understood those to be company policies during the time you were with Georgia-Pacific?

A. Yes, sir.

Q. And did you understand that those twin policies of nondiscrimination in the trading area and meeting but not beating competition were complementary policies?

A. Yes, sir.

Q. And did you understand that price verification calls was one method that was used in order to implement those twin policies of non-discrimination in the trading area and meeting but not beating competition?

A. Yes, sir.

Q. Now, when you received a report from Georgia-Pacific's own sales organization of a lower price in a particular area, was it sometimes true that, based upon other information received from Georgia-Pacific's own sales organization, that you could decide to meet that price by Georgia-Pacific?

A. Yes, sir.

Q. And you could make that decision on those occasions without making a price verification?

A. That's correct.

Q. And, on other occasions, you made the price verification call to ascertain what that truth was?

A. Yes, sir.

[5647] Q. Now, in a case where there was a report from the sales organization of Georgia-Pacific that indicated there was a lower price, was it sometimes true that you didn't believe that report?

A. That's correct.

Q. And did you understand—strike that. And, in the case where you didn't believe the report, you would not meet the lower price?

A. That's correct.

Q. Now, if, in that case where there was a report from the sales organization, which you didn't believe, and you made a verification call and found out that the report was, in fact, true, then you were in the position to meet that lower price?

A. Yes, sir.

Q. And so the making of the price verification call, in those circumstances, made it possible for Georgia-Pacific to put that lower price into the marketplace?

A. That is correct, sir.

Q. Incidentally, Mr. Sikes, did you attend Gypsum Association meetings?

A. No, sir.

Q. During the time you were with Georgia-Pacific, did anyone instruct you not to keep a record of price verification calls?

[5648] A. Never had any such instructions.

Q. And the notes—but it was a fact, on various papers, some of which have been used by the Government, you sometimes made notes about price verification calls?

A. That is correct.

Q. And sometimes, in your notes, you used shorthand symbols to make those notes?

A. Just the 1, 2, 3 code.

Q. Well, did you write anything out in the notes in longhand, or did you use abbreviations or any other kind of symbols, like people do when they are making notes?

A. Oh, initials, made it brief.

Q. Were you able to read everybody else's shorthand notes made in the office on whatever subject——

Mr. FRICANO. Objection, outside the scope of direct examination.

The COURT. I haven't heard any testimony about shorthand. I don't know what we are getting at here.

Mr. MALLIN. Well, there was questioning, Your Honor, about the way he kept notes and whether someone else could interpret the notes, and I am trying to show that——

The COURT. Well, did you take notes in shorthand?

[5649] The WITNESS. No, sir.

The COURT. I didn't hear anything about shorthand.

Mr. MALLIN. I don't mean the way secretaries do.

The COURT. Shorthand has a technical meaning, and you discussed it. I heard no testimony about shorthand.

Mr. MALLIN. I was using shorthand in its common meaning, not to mean a secretary taking shorthand.

The COURT. All right.

By Mr. MALLIN:

Q. Short form notes. Do you understand what I mean by that?

A. Yes, sir.

Q. And did you use a form of notes where you didn't write everything out, as a convenience of just keeping track of the information?

A. Yes, sir.

Q. When you made your notes with respect to price verification calls, Mr. Sikes, were you trying to hide anything?

A. No, sir.

Q. Now, after Georgia-Pacific acquired Bestwall [5650] Gypsum Company, did you become familiar with the fact that Georgia-Pacific began selling gypsum products through its branches located around the country?

Mr. FRICANO. Objection. That is clearly outside the scope of direct examination. Not one word was said about distribution centers or any of this.

Mr. MALLIN. Your Honor, this is a foundation question leading to verification questions.

The COURT. Go ahead. I will hear the question. If it isn't, we will strike it.

The WITNESS. They were just getting into this distribution center on gypsum board at the time I left Georgia-Pacific.

Mr. FRICANO. Move to strike.

The COURT. The whole thing is stricken.

By Mr. MALLIN:

Q. Well, let me ask you this, Mr. .Sikes——

The COURT. All the reference to distribution centers since they were just starting when he got there or when he left there.

The WITNESS. As I can recall, they started down in the southwest with a few distribution centers when I was there.

[5651] By Mr. MALLIN:

Q. And did it spread to other distribution centers when you were there?

A. It started to spread; yes, sir.

Q. Now, when you wanted information about what a branch was selling gypsum board for, where did you go to get that information?

A. From the branch manager.

Q. And did you understand that the branch manager had certain authority as to what price he could charge?

Mr. FRICANO. If Your Honor please, I object to this line of interrogation. Mr. Sikes has already testified that, when he left, the transition was just starting. How could he know?

The COURT. Were branches and distribution centers the same thing?

Mr. MALLIN. Yes, Your Honor.

The COURT. All right. I have already ruled on that, and you have changed the language.

[5652] By Mr. MALLIN:

Q. There was reference to Johns-Manville on direct examination. Is it correct that Johns-Manville and Georgia-Pacific competed for gypsum board business in the marketplace?

A. Johns-Manville was a customer of Georgia-Pacific. We sold them gypsum products.

Q. And did Johns-Manville in turn sell gypsum products into the marketplace?

A. Yes, they sell it to their own customers.

Q. Were those customers in competition with Georgia-Pacific's customers?

A. I would say so, in the same marketplace.

Q. Am I correct that you left Georgia-Pacific in March, 1967?

A. March 17, 1967.

Q. Was that at the time when Georgia-Pacific's Gypsum Division was being moved from Paoli, Pennsylvania to Portland?

A. Yes, sir, that is the time I resigned.

Q. You elected not to move?

A. I was invited, but I didn't go.

Q. And have you had any connection with the gypsum business since March 17, was it 1967?

A. None whatsoever.

[5653] Q. And so am I correct that all the items that were discussed on direct examination with Mr. Fricano happened some time before March 17, 1967?

A. That is correct.

• • • • •

RE-DIRECT EXAMINATION

[5656] By Mr. FRICANO:

Q. Mr. Sikes, you testified on cross-examination under Mr. Mallin that you were trying to, in your price verification calls, as they have been elaborated here on this morning, that you were abiding by the policy of Georgia-Pacific Company not to discriminate in price. Do you recall that?

A. Yes, sir.

Q. Did you testify at page 4242 before the Grand Jury on November 1, 1972—and we will give this a GX No. 5009—did you testify as follows in response to questions that were propounded to you beginning at line 22.

Question. Have you ever heard the expression Robinson-Patman Act?

Answer. Yes, sir.

Question. Do you know what it is?

Answer. It is a—has to do with antitrust and collusion between companies, I believe. I don't know the exact wording of it. I never read it.

Question. Well, did you ever hear [5657] of the term "price discrimination"?

Answer. Yes, sir.

Question. Was that ever explained to you by anybody at Georgia-Pacific?

Answer. No, sir.

Question. Did Mr. McCaskill or Mr. Meyer ever discuss antitrust matters with you?

Answer. No, sir.

Question. Did anyone from the legal department ever come down and talk about antitrust matters with you?

Answer. No, sir.

Question. Is it fair to say that when you talked to your competitor concerning an alleged deviation, that your only interest in doing so was to really save money for Georgia-Pacific Corporation?

Answer. And also to get the facts.

Question. So you could save money?

Answer. That is correct.

Was that your testimony at that time, sir?

A. Yes, sir.

Q. Is it true today?

A. Yes, to the best of my ability, as I recall it at that time.

Q. Did you not also testify on the same day at page [5658] 4228 of the transcript as follows:

Question. Now, Mr. Sikes, we have gone over a number of examples of reported competitive situations that you checked out with competitors. Of what value, do you think, to Bestwall were these checks?

Answer. You mean why the checks were made?

Question. Yes.

Answer. I thought, and I still think it is very important to verify a competitive situation.

Question. Why?

Answer. Rather than go off and take anybody's word on hearsay; that is the way you break a marketplace.

Question. Why?

Answer. Well, it means less profit for your company that you work for.

Question. Why would it mean less profit for the company?

Answer. Because a lot of times if you don't check these and take like a salesman's word for a competitive situation and arbitrarily give John Jones Lumber Company an extra five and Smith Lumber Company an extra five, your whole market is going to go [5659] down, and that comes right off the top.

There is not that much money in gypsum to afford to give discounts.

Question. When the market situation went bad, like in 1965, of what value was price checking at that time?

Answer. When it was bad?

Question. That is right, when prices were deteriorating?

Answer. Well, it could have gotten worse. Declining profits year after year will ruin you.

Question. In other words, no matter how low prices are now, they could even be lower if you had not confirmed them?

Answer: That is correct.

Was that your testimony then and is it true today?

A. Yes, sir.

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[5661] Q. Now, you have testified that you never had any instructions not to keep notes.

Did you ever have any instructions to keep notes?

A. No, sir.

Q. Now, you also testified that you are not trying to hide anything in these price verification calls.

Did you ever tell your customers that you were having them?

A. I don't understand you, sir.

Q. Did you ever inform any of your customers at Georgia-Pacific that you were talking about their business with your competitors?

A. No, sir.

Q. Did you ever tell your salesmen that you were talking over their customers' business with your competitors?

A. No, sir.

[5662] Q. Now, Mr. Keck asked you some questions about the single plant producers which you described as independents.

Is it fair to say that the degree of communication which you had with the single plant producers was far less than by com-

parison with United States Gypsum, National Gypsum, Georgia-Pacific, Flinkote and Celotex?

A. Yes, sir.

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[5664] KENNETH ATWELL called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

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DIRECT EXAMINATION

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By Mr. FRICANO:

[5670] Q. Mr. Atwell, during what period of time have you been employed by National Gypsum Company?

A. In three weeks it will be 30 years.

Q. And that would have been——

A. March of 1945. Pardon me, May of 1945.

Q. Are you presently an officer of the corporation?

A. Of the Gold Bond Building Division, yes, sir.

Q. And you are Vice-President?

A. Yes, sir.

Q. How long have you been a Vice-President?

A. July of 1968.

Q. And what was your title prior to that time, immediately prior?

A. Immediately prior I was a Director of Sales Administration.

Q. Was there any difference in your responsibilities and duties when you held the title of Director of Sales Administration than when you held the title of Vice-President?

[5671] A. There have been some changes, yes, sir.

Q. Have they been substantial or insubstantial?

A. Well, they have been adding a department and taking a department away, on and off, yes.

Q. Would it be fair to say that your title of Vice-President was equal to your title of Director, except that there was a difference of words?

A. Added responsibility, yes, sir.

Q. You said the Gold Bond Division?

A. Gold Bond Building Products Division of National Gypsum Company, yes, sir.

Q. And they are responsible for gypsum wallboard; are they not?

A. That is correct.

Q. And the department in which you worked also was responsible for prices; was it not?

A. That's correct.

Q. And you also did get involved in the credit end of gypsum wallboard price; did you not?

A. Only the competitive credit terms. Not the basic credit.

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[5673] By Mr. FRICANO:

Q. Well, I did say from 1960 to December, 1973. Did you exchange prices and other competitive matters with your competitors?

A. Not inclusive, no.

Q. Not inclusive?

A. Not in that whole period, no, sir.

Q. During what time in that whole period did you do [5674] this?

A. If you are talking about price verification, I am referring to a period of late 1960 or early '61, to January of 1969.

Q. Is it your testimony that you stopped in January of 1969?

A. Yes, it is.

Q. Why?

A. Because it was a result of a conversation I had with counsel.

Q. What did your lawyers tell you?

A. The lawyers just told me of a case that had—I don't know if it came to a conclusion or not, but there was some comment of a Container Case in January. They told me that they didn't think that—they didn't know for sure whether this outlawed

verification or not; but they thought that until it was clarified that perhaps it would be better if I didn't verify prices.

Q. All right.

Did it ever become clarified?

A. Not to my knowledge, because I haven't verified prices since then.

Q. All right.

Now, let's see if we can find out what verificatton means as you are using the term, Mr. Atwell.

[5675] A. All right.

Q. Did you from time to time, when you were having verification discussions with your competitors, get explanations and give explanations for deviations that you were talking about?

A. No. I asked a specific question, I got a specific answer. Perhaps somebody may have volunteered a word or two, but I didn't. It wasn't anything that I considered worthy.

Q. Why did you do it?

A. Why did I do what, sir?

Q. Well, if it wasn't worthy, why did you spend your time on the telephone talking to these people?

A. No. I mean if someone volunteered something, it was something that I wasn't interested in anyway. I asked a specific question, I usually got an answer of yes or no. This is the way I handled verification on my part, too.

Q. Now, you recall this; do you not? I mean, you remember that this is the way you did it?

A. I remember this, yes, sir. Because I was instructed to do it this way.

Q. Were you also instructed to keep a record of what you were doing?

A. No, sir.

Q. Don't you have any notes that you can refer to so [5676] that we can really tell whether it was a yes or a no, or a discussion or something?

A. No.

Q. You don't have any notes?

A. No.

Q. Well, isn't it a fact, Mr. Atwell, that the reason why you don't have any notes is because you deliberately instructed not only yourself indirectly, but also your subordinates, not to keep notes, and that you would stay legally clean?

A. Not that kind of note, no, sir.

Q. Isn't it a fact, Mr. Atwell, that the reason why there are no notes is because you realized that if you were to have kept notes they would have incriminated your corporation and perhaps yourself?

A. Absolutely not, no, sir.

Mr. FRIANO: May the witness have Exhibit No. GX 29, please.

We have them in little glass folders there.

By Mr. FRICANO:

Q. Can you identify that exhibit?

[Witness examining documents.]

Mr. DELONE: Are there three exhibits?

Mr. FRICANO. If Your Honor please, it is a three-page exhibit and they are in the glass folders to [5677] preserve them because they are tissue paper.

Mr. DELONE. I just wanted to make sure I have the same thing the witness has. Thank you.

The WITNESS: I have read it, sir.

By Mr. FRICANO:

Q. Can you identify it?

A. Yes, I can.

Q. What is it?

A. These were notes that I made for a speech I gave at a Division Managers meeting in Buffalo.

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Mr. FRICANO: I wish to read the document in its entirety to the jury, Mr. Atwell's speech.

To my knowledge • • •

Mr. DELONE. Would you give us a date, please.

Mr. FRICANO. October 25, 1968. The exhibit is Government Exhibit 29.

To my knowledge, no one of you have been [5678] authorized by management to discuss prices with competition, but it is quite evident that some of you do this.

If you choose to do this, I would like to bring out the following precautions that should be taken.

Be sure there is practically no lag time involved in sending in the RTMC—report of competition forms [5680]—on price competitive situations you have met.

Do not attempt to instruct the plant on invoicing, even if the price met is within your guidelines.

You know Mr. Gustavus, as well as many others in our company, were called upon to give depositions in a current legal situation. The reason Mr. Gustavus was included was because he, at one time, was given the type of authority now being given to you. This means there is very little doubt in our mind that you could be deposed at some future date to explain your actions, so make sure you keep yourself legally clean.

[5681] By Mr. FRICANO:

Q. Now, Mr. Atwell.

A. Yes, sir.

Q. I ask you again, is it not the fact that you instructed your subordinates not to make notes, your exact words, "refrain from making notations on files or note pads regarding your conversations with competitors' employees," so as to keep yourself legally clean?

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[5682] The WITNESS. You heard Mr. Fricano read, earlier, that I attended an antitrust seminar; that, in this seminar, they said that inaccurate notes made by your salesmen, when they happen to meet a competitor in the field, could prove to be not to your favor, in the notations. Now, that isn't very artfully stated, but that was what it meant.

By Mr. FRICANO:

Q. Not to your favor. In what way not to your favor, Mr. Atwell?

A. Well, there are many ways. A salesman of ours may meet a competitor's employee and merely say, "Hello," and it might be the day of a price increase, and he might just say, "Saw John Jones of—" certain company, and this, of course, could be incriminating, and things like that.

Now, first of all, it has nothing to do with verification and, second of all, to me, there wasn't anything subversive about it.

Q. Who is Mr. Gustavus?

Never say anything to any competitive employee indicating agreement.

That is, do not say, "we will refrain from extending the extra 5% if you will."

Do not say, "well, if you are not trucking, we won't.'

Do not say, "We don't think you should be selling this type of account."

Be careful not to extend any price advantage to a customer without reasonable competitive information. There is always an urge to give an extra discount for a big order or for a favored customer. This cannot be done.

We know, and have proof, that some salesmen have asked customers if they would give us business if we could get them an extra discount. This is illegal, unless we make the same offer to everyone in that marketing area.

Be careful of any advantages you are tempted to give customers that are not competitive. In our [5679] antitrust seminar we were told of a case where one company suffered because one of their salesmen gave some of his commission to a customer to get orders. This was proven to be discriminatory.

Do not write notes or letters to competitors' employees unless approved by Buffalo.

Refrain from making notations on files or note pads regarding your conversations with competitors' employees.

The question of keeping 100% Gold Bond customers competitive arises on occasion. If you truly have a 100% Gold Bond account, not a 90% or 80% account, whom you feel is at a disadvantage because we, the National Gypsum Company, have met competitive discounts with customers immediately in his area, you may, within your authority, on good faith, extend the same to the 100% Gold Bond account. But in such cases we would recommend you write these details in letter form to us.

Never discuss with any competitors' employee our intentions or what we plan to do, whether it is adding trucking service, increase price, decrease price, selling certain type of customers, et cetera.

A. Mr. Gustavus is deceased. He was a—our representative on the West Coast.

Q. A pricing man?

A. Well, he was a vice president at one time, sir.

[5683] Q. That is right; a pricing man?

A. Yes. Well, he had price authority; yes, sir.

Q. And you have price authority, too, don't you?

A. Yes, I do.

Q. And Mr. Nicely, your superior, has pricing authority, too; does he not?

A. He had price authority at this time.

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[5685] • • •

By Mr. FRICANO:

Q. Mr. Atwell, did you provide, at one time or another, a copy of your outline here, GX 29, to Mr. Nicely?

A. I believe I did.

Q. And was it at or about the time it was written?

[5686] A. Although I can't tell you specifically, I think it was; yes.

Q. Did Mr. Nicely direct you to make this speech or to give this topic?

A. No. I think—I don't think, I know that I requested to make it because I had, within, oh, three or four months, come from an antitrust seminar, and I thought it something I ought to talk to our division managers about.

Q. And Mr. Nicely agreed that you should give it; is that correct?

A. He allowed me to.

Q. And then, subsequently, you made certain changes in the document, and you informed him in your memorandum to him. "Subject: Legal Notes," dated October 28, 1968; did you not?

A. Yes, I did.

Q. Now, in that memorandum—I will read the memorandum. This is 30A, as in apple or in Atwell.

"After re-reading the legal advice I gave you——"

By the way, are you a lawyer?

A. No, I am not.

Q. You don't have a law degree?

A. No, I don't.

Q. "After re-reading the legal advice I gave you, I would like to clarify one statement which I think [5687] is ambiguous.

"First of all I made the statement that 'to my knowledge, no one of you have had approval of Buffalo' to contact competitors' employees, and that if you 'choose to continue this practice' of occasionally talking to competitors' employees, certain precautions should be taken.

"This definitely should not be interpreted as approval to discuss anything with any competitor's employee.

"The letter should have have read that if you receive a phone call or unexpectedly meet a competitor's employee who talks to you and, if you choose to talk to them, rather than hang up the phone, or walk away from them, the precautions in my letter should apply."

Would the precaution not to keep notes and memoranda then apply, Mr. Atwell?

A. That's what this speech said. Yes.

[5688] By Mr. FRICANO:

Q. Now, you said that this is for salesmen to protect the company against a salesman inadvertently writing something down on a piece of paper and thereby incriminating the corporation; is that right?

A. I said there is that possibility, yes.

Q. Was Mr. Gastavus a salesman?

A. Well, he is dead.

Q. Was he?

A. At one time he was a salesman, yes.

Q. All right. When he testified, when he was deposed——

A. Right.

Q. —was he a salesman?

A. Well, I don't know—he wasn't a salesman, but I am not sure if he was vice president at that time. I don't know.

Q. He was deposed according to this some time in 1968?

A. I don't know. I don't really know. I think he was a vice president in 1968.

Q. There is a stipulation between the parties which states that in 1968 he was a divisional vice president, Western Sales.

A. That is right.

Q. You weren't a salesman at this time when you were deposed, but you were a director of sales administration, [5689] weren't you?

A. In 1968, if I was deposed in 1968, I would have to call on my memory as to whether it was before or after July.

Q. It states here—oh, I see.

Well if I refresh your recollection and tell you that you were deposed almost one month to the day before you wrote that memorandum, would that help you?

A. Oh, yes, because I became a vice president in July, yes, sir.

Q. You were deposed in September, mid September, 1968, and almost one month thereafter you wrote a note, this letter that you call it, one document, and gave advice to a number of people; is that correct?

A. That is correct.

Q. And your memorandum is rather explicit, is it not, and it doesn't say anything about bumping into a salesman on a corner or something like that; it says: "To my knowledge no one of you have been authorized by management to discuss prices," doesn't it?

A. Which one are you looking at?

Q. 29, the first sentence, Mr. Atwell, on 29.

A. Oh, to discuss. Yes, that is right. That is what it says.

* * * * *

[5694] Q. Did you during the course of these years when you engaged in what you call verification, Mr. Atwell, have so-called verification calls with Mr. Robert Sikes of Georgia-Pacific, the man who was just on the stand?

A. I had a few, yes.

Q. On job price protection?

A. I don't recall job price protection, no, sir.

Q. Did you have any with Mr. A. L. Meyer with Georgia-Pacific?

A. That I talked to him about any kind of price verification?

[5695] Q. Yes, sir.

A. Who was this?

Q. A. L. Meyer.

A. Yes, sir.

Q. How about Mr. McCaskill?

A. No, sir.

Q. Let's find out whom you were talking to, Mr. Atwell.

With whom did you have these so-called price verification conferences with at United States Gypsum?

A. First of all, the price verification that I am talking about is, of course, as I described before, between late 1960 and the first part of January of 1969. And at U.S. Gypsum Company I did price verify with Mr. Gimlin, Mr. O'Brien, Mr. Weiser, and I think there was a Mr. Baldwin at one time.

Q. How about Mr. Evans, Bob Evans?

A. Yes, sir; yes, sir.

Q. And how about Mr. Henry Bear?

A. I don't recall verifying with him, no, sir.

Q. Mr. Shaver?

A. Who?

Q. Shaver, I don't know. Shaver, I don't know. I am sorry. No, I don't know Shaver.

[5696] Q. And Mr. Lane?

A. I may have verified with Mr. Lane, yes.

Q. And Mr. Andy Watt?

A. No, sir.

Q. Do you know if anyone else in your corporation like Mr. John Brown, did he ever verify, as you used the term, with Mr. Watt?

A. I don't know that, no.

Q. How about at Georgia-Pacific? You have already named Sikes and Meyer, have you not?

A. You asked me about those, and I said, yes, sir.

Q. How about Mr. Fatz?

A. Yes, I believe I did.

Q. And Mr. Burch?

A. No, I never verified with Mr. Burch, no.

Q. How about at Celotex?

A. Verification at Celotex would have been with Mr. Don Miller.

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Q. How about Mr. Greenwood?
A. No, sir.
Q. How about Mr. Warren Hill?
A. Yes, sir, it might be possible there.
Q. And how about—
When you say it would have been with Mr. Miller, it was with Mr. Miller, wasn't it?

[5697] A. It was with Mr. Miller, yes, sir.
Q. Now, how about Mr. Greenwood?
A. No, sir.
Q. He was too high in the corporation?
A. He was at that time, yes, for me, yes.
Q. These people witn whom you verified, were they more or less counterparts of yours in the competitive companies?
A. Well, I don't know all their titles, but I assume that, yes.
Q. How about Mr. Fisch at Celotex?
A. I don't really know. I don't know whether I did or not. I happened to know him because he worked for us, but I don't know if I verified with him, sir.
Q. All right.
How about at Flintkote?
A. Flintkote. Mr. Malhiot and Mr. Anderson and Mr. Wagner.
Q. How about Mr. Carpenter?
A. No, sir.
Q. Mr. Tom MacDonald?
A. Not that I recall, no, sir.
Q. Mr. Moran?
A. No, sir.
Q. Mr. Pecaro?

[5698] A. No, sir.
Q. How about Kaiser Gypsum?
A. There is only one person I recall verifying any prices with there, and that was Mr. Hague.
Q. How about at Fibreboard?
A. That is Pabco, sir?
Q. Yes.
A. Mr. White.
Q. O. C. White?

A. Yes, sir.
Q. How about at Johns-Manville?
A. I don't recall ever verifying anything with them.
Q. Did you ever ask Mr. Sikes to verify for you with Johns-Manville?
A. No way, no, sir.
Q. Did you ever verify with Mr. Ted Armstrong, Sr. at Temple or Texas Gypsum?
A. Yes, I have.
Q. How about Melvin Quayle at American Gypsum?
A. Don't even know the name.
Q. Or his boss, Mr. Mage Hardin?
A. No, sir.
Q. Now, did you ever verify with Mr. Morgan?
A. No, sir.
Q. And he is the chairman of the board of United [5699] States Gypsum ?
A. Yes, I know he is.
Q. Do you have now, to your knowledge, any notes or memoranda in your possession—when I say in your possession, at your office back at National, or anywhere, that would show a day-by-day so-called verification, what was said, what was done, the frequency of calls, in a note or memorandum form?
A. Absolutely not.
Q. Do you recall that in 1964 National Gypsum came out with a new product, for it, called water resistant board?
A. Well, we came out with a product at one time, and we called it moisture resistant board, not water resistant board, yes, sir. But I don't know that it was 1964, no.
Q. Do you recall that on the occasion of your coming out with this product prior to the time which you did, that you had a discussion with either Mr. Weiser or Mr. O'Brien of United States Gypsum at which time you gave them information with respect to prices that you were going to be charging, and the basing points that you were going to be using?
A. No, sir; no, sir, I do not.
Mr. FRICANO. May the witness have GX 250.

[5700] By Mr. FRICANO:
Q. Do you have that in front of you, sir?
A. Yes, I have.

Q. This is in evidence.

This is a report of competition from the files of United States Gypsum Company.

You will note on the second page, I believe, there is a handwritten note and it says, "Mr. O'Brien".

It is dated August 29, 1964.

It says,

> National's Medicine Lodge f.o.b. prices on board products are the same as ours on all board at Southard, Southwest, et cetera.
>
> Therefore, we would equalize with them on items sold on mill base and freight basis.
>
> If and when they can ship such a product, this PA or green bulletin price is in order.

And there are three question marks and the name Atwell. Is that not correct?

A. That is correct.

Q. Now if you will turn to the next document preceding it, you will see that that is dated September 4, 1964, and this is a note from Mr. O'Brien back to Mr. Weiser.

A. Um hum.

Q. And he says,

> [5701] National either has or will shortly have a product similar to our water resistant. Their f.o.b. mill price will be competitive to ours. Their manufacturing and shipping points will match ours. Equalized freight will be added to the mill price. The equalized freight to be calculated from either the National or competitive mill making the rate.

Where did Mr. O'Brien get that information?

A. I don't know where he got it. I can't tell you.

Q. But it is your testimony, is it not, Mr. Atwell, that from time to time you did "verify" with both Mr. Weiser and Mr. O'Brien?

A. That is my testimony, yes, sir.

Q. And your name, I know you didn't write it there, but your name appears in this file?

A. It sure does.

Q. And the product they are talking about is a product that is not yet out yet for National Gypsum?

A. I don't know that, but this doesn't surprise me.

Q. Is that a verification?

A. I don't know whether it is a verification or not. I can't tell you that.

Q. Is that your concept of verification?

A. If I had a published price and a man called me and asked if my price was $48 or something else, that would be [5702] price verification.

Q. And you would tell him, if he asked you that, your f.o.b. mill price would be competitive and the manufacturing and shipping points would be the same; that the equalized freight would be added to the mill price and where you would be calculating it and how you would be calculating it, is that right?

A. Well, no, that is not quite it.

Before we can sell a product, we have to establish a price. We put the price in the price books, so our salesmen can solicit a product. If a dealer told a United States Gypsum representative that we were trying to solicit a product at a certain price and I had the price published and someone called me and said, "Do you have a published price on so and so?", I would say yes, sure.

Q. Would you also provide the caller with all the information that appears on the note from O'Brien to Weiser?

A. No, I wouldn't.

Q. How did he get it?

A. I didn't write it, sir. I don't know.

Q. Did you, at one time in 1966, divulge your internal policy with respect to trucking in Florida to Mr. Sikes of Georgia-Pacific?

A. Well, I—in 1966 did I divulge an internal policy?

[5703] Q. That is right.

A. I don't know. I can't remember anything like that.

Q. Please give the witness 155.

Now if you will look at that, you will see that this is in evidence and you will see the first page of that has a number of cities listed and the various costs per square foot as compared to rail freight and truck freight. Do you see that?

A. Yes, I do.

Q. If you will flip over to the back of that exhibit, you will see one of these little handwritten notes.

A. Yes, sir.

A. That is not my company.

Q. But that is the kind of note you were worried about?

A. Especially if they say K. A. and they try to make it my name. There are a lot of K. A.'s.

• • • • •

[3710] Q. All right.

Sir, let's go on to 73.

Before we get to it. I will ask you some questions.

Do you recall ever having a discussion with Mr. McCaskill—I believe you said you didn't price verify with him.

A. That is right. I have no recollection of price verifying with him.

Q. Do you recall having a rather lengthy conversation in 1966 with Mr. McCaskill, at which you discussed prices for Savannah and LaFayette, Louisiana?

A. No, sir, I don't.

Q. Do you recall whether or not at this time that you had advised Mr. McCaskill that if Georgia-Pacific continued selling at lower prices in this marketing area, the inevitable result would be for you to lower the price of your Savannah plant?

A. No, no, sir.

Mr. FRICANO. Could I have 73, please.

[3711] By Mr. FRICANO:

Q. If you will look at page 3 of that exhibit, you will see a rather lengthy page with handwriting on it, is that correct?

A. Yes, it is.

Q. Red ink and black ink and black pencil marks?

A. Yes, sir.

Q. What is the name right there at the top of the page?

A. K. Atwell.

Q. This is taken from the files of the Georgia-Pacific Corporation, Mr. Atwell.

A. Was it?

Q. It has been identified to be in the handwriting of Mr. McCaskill of that corporation.

You will see below your name are the words warehouses, Atlanta, 50 cents above dealer price to a dealer. Dealer's name: and the words Savannah $1.24 with the word 5% underneath it in a circle, and two prices alongside and then there is Lafayette,

Q. That says—and that has been identified as a note by Mr. Sikes to Mr. Meyer of Georgia-Pacific—

National announced internally that they are meeting Kaiser in Southeast except northern tip of Florida.

Do you see the initials?

A. It looks like south.

Q. Southern tip of Florida.

Do you——

A. I see the initials.

Q. What are the initials?

A. K. A.

Q. What are your initials?

[3704] A. K. H. A.

The COURT. I have asked you not to address——

Mr. DELONE. I believe Mr. Fricano——

The COURT [continuing]. —cross table comments to each other.

Mr DELONE. I believe Mr. Fricano misspoke when he said this was written by Mr. Sikes. I believe the testimony was it was written by Mr. McCaskill. I believe that is correct.

Mr. FRICANO. Either way.

By Mr. FRICANO:

Q. You are identified by the witness as the person from whom this information was received.

Is that a verification?

Mr. DELONE. That is not accurate, either.

I object to that statement. That is not accurate. No witness said Mr. Atwell provided the information. The witness that wrote it was not asked about it.

Mr. FRICANO. I will rephrase the question, Judge.

I don't want to go back in the record at this point.

By Mr. FRICANO:

Q. Mr. Atwell, did you, as part of your verification [3705] practice, give to someone at Georgia-Pacific, whether Mr. Sikes, Mr. Meyer or Mr. McCaskill, internal information relating to what you were going to be doing competitively in the southern tip of Florida?

A. Not to my knowledge, no, sir.

Q. This is the kind of little note, you warned your people not to keep, isn't it?

Louisiana and some writing underneath that and some writing down the middle of the page.

Mr. DELONE. Why don't you read——

The COURT. Let him ask the question his way.

Mr. DELONE. I object to reading part.

[5712] The COURT. I don't want to tell you again not to make those comments across counsel table.

Mr. MELLOTT. If the Court please, I would request that the name of the customer that appears on this document also be read, when he is reading.

The COURT. Let him do what he wants and the document can be read in its entirety.

By Mr. FRICANO: Q. Then there is more writing at the bottom of the page.

Now if you will turn over to the preceding page, you will see a note which has also been identified to be Mr. McCaskill's handwriting, with an instruction to Bob Sikes. It says,

> Cali Kenny Atlanta and Savannah. Publication going out this week. New prices f.o.b. warehouse to dealers only are carload plus 5%. Cannot explain LaFayette as they are granting to both dealers and builders and applicators. However, they have not quoted carload price pick-up at warehouse to anyone. Possibly the dealer is construing their mill sale carload solicitation as f.o.b. warehouse. What is dealer's name involved? What is dealer's name involved in Savannah?

Do you recall, Mr. Atwell, that Mr. Sikes called [5713] you and gave you advance pricing information from Georgia-Pacific?

Mr. MELLOTT. If the Court please, I object to that question. There is no foundation in the record about it.

The COURT. He is asking the question. He doesn't need a foundation for it.

Go ahead.

[5714] Q. Do you recall, Mr. Atwell, that at or about this time, pursuant to Mr. McCaskill's instructions to Mr. Sikes to call Kenny, that you received advance pricing information from Georgia-Pacific?

The COURT. Now, whether he received——

By Mr. FRICANO:

Q. Whether you received it from Georgia-Pacific?

A. There isn't anything about this, Mr. Fricano, that's familiar to me.

The COURT. No. He wants to know whether it happened or not. Mr. Atwell.

The WITNESS. I don't recall its ever happening; no.

The COURT. All right.

Now, do you want to read a document, Mr. Mellott?

Mr. MELLOTT. Your Honor, all I wanted to do was——

The COURT. Do you want to read it now?

Mr. MELLOTT. I would like to read the name of the customer that appears on the document that Mr. Fricano was reading from, which is Doug Ashy Lumber Company.

The COURT. All right. Go ahead.

That is all you wanted to read?

Mr. MELLOTT. That's all.

The COURT. All right.

* * * * *

[5724] * * *

Q. Is that a verification?

A. If I asked if they were trucking, and if they offered the fact that they didn't truck and it was a mistake, that would have been a verification, yes.

Q. Didn't you just say in your earlier testimony that [5725] if they offered explanations you didn't pay any attention to it?

A. I said that most of it I didn't pay any attention to it, that's right.

Q. You sure did pay attention to this one though; didn't you, Mr. Atwell?

A. If that's what it was. If that's what it was, yes, sir, I did.

Q. Did you ever tell a competitor in one of those price verification conversations that you made a mistake and that you wouldn't do it again?

A. Well, I wouldn't say "I wouldn't do it again." I don't know if I said I made a mistake or not, we made a mistake or not. I don't recall saying that, no.

* * * * *

[5726] Q. You had a subordinate for a part of this time. By the name of Earl Kroth; did you not?

A. For part of this time, yes, sir.

Q. Was Mr. Kroth empowered to——

I withdraw this.

Didn't Mr. Kroth also engage in this practice that you have described as verification?

A. He had no authority from me. I did not authorize anyone to do it but myself.

Q. Did he do it?

A. To my knowledge he didn't do it, no.

[5727] Q. Well, is that your present knowledge, too?

A. My present knowledge of course, since the document was brought up late in '69 stating that I had written to them, that there was some reason for me to write the document, that I don't really know. And that was after price verification had stopped on my part.

Q. But not on theirs?

A. I don't know anything about their part.

Q. Why did you write them the document?

A. I wished I knew that. I don't know.

Q. Were you in here when Mr. Sikes was testifying?

A. Yes, I was.

Q. Did you hear Mr. Sikes testify that he engaged in the verification practice with Mr. Earl Kroth?

A. I heard that.

Mr. FRICANO. If Your Honor please, I think perhaps one of the juror might wish a recess.

The COURT. Well, I am not going to ask, but we will take a ten-minute recess.

[Recess taken.]

The COURT. Proceed.

By Mr. FRICANO:

Q. Mr. Atwell, who then at National Gypsum authorized you to engage in verification, as you have described it?

A. Mr. John Brown.

[5728] Q. Who else?

A. Well, he is the only one that authorized me.

Q. Did Mr. Nicely authorize you?

A. Well, I was doing it at the time Mr. Nicely became my superior, and no one said to stop.

Q. How about Mr. Colon Brown?

A. I never talked to Mr. Colon Brown about this at all that I know.

Q. Mr. Atwell——

A. Yes, sir.

Q. Didn't you from time to time discuss a specific price verification with a competitor when Mr. Brown was standing right there?

A. Never to my knowledge, no, sir.

Q. Did Mr. Brown, Colon Brown now, was he aware of the fact that you were engaging in this practice?

A. Well, I didn't talk to him about it, but I think he was, yes.

Q. Now, with respect to job price protection itself.

A. Yes, sir.

Q. Did you from time to time check with your competitors on job price protection?

A. Even though I don't recall it, there is a possibility I did, yes, sir.

Q. And at what time, times, did job price protection [5729] become more critical?

A. With National, job price protection became more critical at the time of a price increase.

Q. Would that be between the time of an announcement and the time of the effective date?

A. Generally it would be between the time of our announcement and our effective date, yes, sir.

Q. Is it fair to say that if there is job price protection in the market, enough of it——

A. Yes.

Q. —that it could stifle, kill, or otherwise negate an announced price increase?

A. If there was enough of it, yes.

Q. Now, do you recall—and I know this is a while ago. Do you recall that in 1965—Which, by the way, was not a very good year; was it?

A. Not for us.

Q. That was a difficult year?

A. It was a very difficult year, yes, sir.
Q. There was a great deal of competition; was there not?
A. Yes, there was.
Q. And what was your profit picture in 1965; was that bad?
A. It was bad, yes.

• • • • •

[3737] • • •

Q. Is it that they were requesting or pressuring, as the case may be, that the effective date of National Gypsum's price increase be postponed for 60 days?
A. That is what I read here, yes.
Q. All right. And then you said your checking revealed that no one else is going to do it, and then a note by John Brown says, "We will not protect," does it not?
Mr. DeLone. I object to the form of the question. That is not what the document says. I object to it unless the document is accurately read. Mr. Fricano mistated the document, and I would ask that it be read in proper language.
The Court. We will avoid that if you will ask proper questions.
Mr. Fricano. I am sorry.
The Court. That wouldn't happen.
I am sustaining the objection to the question.
Mr. Fricano. All right. I am trying to rephrase it, Your Honor.

By Mr. Fricano:

Q. In any event, sir, you reported this information to Mr. Brown, did you not?
A. In 1965, right, yes.

• • • • •

[3742] • • •

Q. Is it fair to say, sir, that up through about the middle of 1968, in that time period, that competitive activity that is—I wouldn' say competitive activity—that prices generally remained stable in the gypsum wallboard industry among at least the major manufacturers?
A. No, sir.
Q. No?
That is not a fair statement?

A. No.
Q. How long did they remain stable?
A. I don't know what you mean by stable, but I know we found enough deviations, enough prices different from ours that caused us to decrease our prices in the middle of '67 by $2.00 a thousand.

• • • • •

[3744] • • •

Q. Then there was another increase and I ask you if you can recall this, sir, on May 1, 1966, through the entire United States. Do you remember that?
A. I remember an increase in May of '66, yes.
Q. And there was another increase on February 20th. That is right in the wintertime again.
A. Sure is.
Q. Only in the east. Do you remember that one?
A. I don't remember it was '67. I remember we had something east and something west. I don't remember the specific dates, no.
Q. And March 13, 1967 there was an increase in the west, but you say you don't recall that?

[3745] A. No, sir.
Q. May 15, 1967 there was a decrease. That is a minus. That is your $2 right there.
A. Yes, sir.
Q. And on September 18, 1967 there was an increase of $3.75 for an incremental increase of $1.75, but you don't remember that?
A. I don't remember specifically.
Q. January 15, 1968, there was another increase, correct?
A. Um hum. That is what is shown. I don't remember.
Q. You don't remember that.
Now September 16, 1968—someone sacrilegiously wrote didn't hold on this one. Do you remember that increase of September 16, 1968?
Mr. Mellott. If the Court please, I entered into no sacrilege when I wrote that. It was based on testimony of a witness on the stand.

Mr. FRICANO. I was trying to be facetious—not facetious—I apologize to counsel. I didn't mean anything by that.

• • • • •

[5746] • • •

By Mr. FRICANO:

Q. Didn't prices remain reasonably stable among the [5747] major manufacturers of gypsum wallboard from December 15, 1965 to approximately September 16, 1968?

Mr. DELONE. Objected to unless Mr. Fricano specifies which prices. There have been two prices we have talked about frequently. I am trying not to——

The COURT. You are talking of what I assume are market prices.

Mr. FRICANO. Market prices.

Mr. DELONE. And list prices.

Mr. FRICANO. Actual transactions, market prices.

• • • • •

[5748] • • •

The WITNESS. With the exception of the May decrease they were reasonably stable, yes, sir.

• • • • •

[5769] • • •

Q. Yet Mr. John Brown granted you authority to call the competitor directly to find out the same information, did he not?

A. If I verified a job at any time, he didn't withdraw my authority.

• • • • •

[5777] Q. All right, sir. Now, did you, National Gypsum, at this time, December 15, 1965, do anything else differently, internally, that you had never done before with respect to the administration of this price increase?

A. Did we do anything else internally? That is kind of broad?

Q. Well, did something that you had not done before, and which you did not announce publicly, that you kept within the organization?

A. That we did not announce publicly?

Q. That is right.

[5778] A. The only thing I can think of you might be talking about is the authority for deviating from price.

Q. What happened with respect to that?

A. Some time around December 15, 1965, or after, I was told that Mr. Brown, Colon Brown, was the person that would authorize—or, no price would be dropped until we talked to him.

Is that what you were referring to?

[5779] By Mr. FRICANO:

Q. Yes, sir, exactly.

A. That is the first time that that happened.

Q. You mean with Mr. Brown?

A. Yes, sir, Mr. Colon Brown. Yes, he became chairman that year, 1965.

Q. They removed all your authority that year, didn't they, to deviate from prices?

A. From prices.

Q. And they removed Mr. Nicely's authority?

A. To my knowledge.

Q. And Mr. Brown's authority?

A. To my knowledge.

Q. Was this a centralization of authority in one man?

A. You mean—I don't know how to answer that. I have price authority now and it is centralized in me and I don't know what you are differentiating from.

Q. Let me try to restate it. Maybe that is obvious and that is why I am having difficulty, too.

At this time, when you were told about Mr. Colon Brown, it was only he that had any authority at all to allow any deviation from prices or any other practice, standard practice or policy of National Gypsum Company?

A. That wasn't my understanding, no, sir.

[5780] Q. What is your understanding?

A. My understanding was that when it came to prices, we were not to deviate unless Mr. Brown, Colon Brown, authorized it.

I still have the authority, if I wish to use it, on services or things of that type.

Q. Don't you recall writing memoranda—in fact, I think I read one to you—where you suggested to Mr. Nicely you should start competing against certain companies on services?

A. Yes, I did, yeah.

Q. If you had authority, why did you ask him?

A. I can't answer that right now. I don't know.

Q. That is not consistent, then, is it?

A. It is consistent to me, yes. That doesn't mean Mr. Colon Brown stopped us from doing it. Maybe it was case where Mr. Nicely and I decided not to do it.

The COURT. When you ask that kind of question, that is where you get.

By Mr. FRICANO:

Q. Mr. Atwell, in addition to Mr. Brown keeping the authority with respect to prices——

A. Um hum.

Q. ——to himself——

A. Um hum.

[5781] Q. ——or deviations, was there anything else that was done at this time by National Gypsum Company which also was not announced publicly?

A. You are asking me to remember things we didn't do ten years ago. I don't know what you mean.

Q. Did you not decide internally at National Gypsum that you would not meet the competitive prices, competition of a single plant producer?

A. Oh, no, I don't think we ever had such policy. We used from time to time, as I said, as a strategy. We did not meet any competition.

• • • • •

[5782] [Government Exhibit No. 800 was received in evidence.]

By Mr. FRICANO:

Q. This document, Mr. Atwell——

A. Yes.

Q. ——dated February 14, 1966——

A. Yes, sir.

Q. ——approximately two months after—with respect to this document which is dated February 14, 1966——

A. Yes.

Q. It has a form attached to it, does it not?

A. Yes, it does.

Q. Was this form in existence prior to December 15, 1965?

A. I don't believe it was, no.

Q. Why was it created?

A. It was created to get reports of competitive gypsum activity after the price increase.

[5783] Q. Is it fair to say, Mr. Atwell, you were keeping very close contact and watch on what prices were doing in the marketplace after December 15, 1965?

A. Definitely.

• • • • •

[5785] Q. Mr. Atwell, if it was your policy not to meet anybody's competition, why did you continue to verify prices?

A. It was my responsibility and my pricing job to keep my superiors advised and I verified a price occasionally and if I found anything, I would report it.

Q. Why did you bother, if you had a policy not to meet anybody's competition?

A. Well, I don't know that I was—I would take anything forever. I thought that maybe if we—if I [5786] reported certain things, maybe someone would change their mind.

• • • • •

[5824] • • •

Mr. FRICANO. Please hand the witness Exhibit 476. Excuse me.

[The exhibit is handed to the witness.]

By Mr. FRICANO:

Q. Do you have that, sir?

A. Yes, sir.

[5825] Q. Is that your announcement on the December 15, 1965, price increase?

The COURT. Is that in evidence?

Mr. DELONE. It's in evidence, and I stipulate to that, Your Honor.

The WITNESS. Yes, sir.

By Mr. FRICANO:

Q. Do you recall, sir, that all your other major competition as of this time also changed or announced a price increase, excuse me?

A. I have a recollection of it, yes, sir.

Q. And do you recall that all of the major competition, all of your major competition, increased their prices or changed their prices, what have you, effective December 15, 1965?

A. That is the way I recall it.

Q. All right.

Now, by your announcement—excuse me, not by your announcement, but internally you did announce the withdrawal of all deviations from price lists, did you not?

A. Yes, it says so right here, yes.

Q. And I tried to ascertain from you yesterday whether or not it was your internal policy not to meet the competition of single plant producers; do you recall that?

[5826] A. Yes, sir.

Q. And you said it was your policy not to meet anybody's competition?

A. For that period of time, yes sir.

Q. We also established that there was one other change, that Mr. Colon Brown, Chairman of the Board, took all the authority into his own hands to authorize, if at all, any deviations from price lists; do you recall that?

A. Yes.

Q. And you had testified that with respect to the West Coast, in any event, that you did compile job price protection documents; do you recall that?

A. I had documents, yes, sir.

* * * * *

[5834] By Mr. FRICANO:

Q. Mr. Atwell——

A. Yes, sir.

Q. That is identical to the one you have before you, so, unless you want to look at that one, you don't have to.

A. I will take your word for it, sir.

Q. Now, that shows, in step-by-step fashion, does it not, the action which National Gypsum intended to take with respect to the December 15, 1965, price increase; does it not?

A. Yes.

Q. And it speaks in a future sense, does it not, with the word, "procure"?

Mr. DELONE. Objected to. The document speaks for itself.

The COURT. It does.

By Mr. FRICANO:

Q. All right, sir. Now, as you go down that document, you will find that November 24 has been—paragraph No. 9, with what activity was to take place on November 24, has been struck; has it not?

A. Yes, it has.

Q. And it has been incorporated up in paragraphs 7 and 8, in your handwriting; has it not?

A. Yes. Yes.

[5835] Q. All right, sir. Now, it refers, in paragraph 8, to "our new policy." Do you see that, paragraph 8?

A. Yes, it does. Yes.

Q. All right, sir. When was that new policy formulated?

A. I don't know that the policy was even formed at that time. This was—this plan of action was a result of a meeting we had, saying what we were going to do after we heard that USG had announced a price increase in the field, and this, to me, means when we decide, and I don't know when this was made. We may have made a decision by then, but, at any rate, if and when we decided, we would send that new policy to the people, the states.

Q. Well, isn't it fair to say, Mr. Atwell, that the new policy referred to there had to be formulated prior to November 17, 1965?

A. No. No.

Q. Was that new policy discussed on November 17, 1965?

A. Yes, it was.

Q. With whom?

A. A meeting that we had with Mr. John Brown and Mr. Jay Nicely and Mr. Manske.

Q. And what was the new policy?

A. The policy was we were going to try to find out what USG did, and we were going to follow it just as closely [5836] as we could, and that would be our policy, and we would let our dealers know it and our sales people know it and all.

Q. So you were going to prepare a letter, Mr. Brown was going to help, and Mr. Nicely, and you were going to send it to all your dealers throughout the country, saying you were going to be just like USG; is that right?

A. I wouldn't say it in those words, no, but that would be the intent. We were going to follow it, whatever we found it to be, we were going to follow it.

Q. Have you, in the past, told your dealers you wanted to be just like USG?

A. I don't think we ever did.

Q. Well, that doesn't mean that, then, does it?

A. I wouldn't send a bulletin out and say we were going to be like USG or anyone else. It would be a policy that would recite things that we want to have done, and it would have been, and they were, at that time.

This is just about the same as those we picked up.

Q. Did all the events, as depicted on GX 500 actually occur on the dates specified?

A. Oh, you want me to go down item for item, sir?

Q. Well, if you can glance at it, sir——

A. Well, on November the 17th, we knew there was a letter out. We had had a call from one of our people, and we were going to procure that from our man who had called in, [5837] and that we did not have on the 17th, no—and, when the man called in on the second item, he also told us that he had a copy of a USG letter of November 17, too, the sales force, and we told him to send that in, and we were going—this is what we meant by procuring that, getting that into the Buffalo office.

On the 19th, "Procure USG price list for all zones," this was living in hope. We were going to go out to our people and tell them of what we heard and tell them to pick up what they could and send it in to us, and we had hoped, within a few days, we could get all the information we needed.

Q. And, ultimately, in that connection, you had to call United States Gypsum directly; did you not?

A. I don't recall whether I did or not.

Q. Didn't you get what is called a mint set of USG price sheets about an inch thick?

A. We—yes. Yes.

Q. And were these not United States Gypsum prices, for the United States Gypsum products in every zone?

A. I do know that it was a thick file, but I can't testify it was for every zone. I don't know that.

Q. All right, sir. Proceed.

A. Then, it appears here, and now—except for jumping down to the 24th, I would be testifying from the document, because my memory doesn't serve me that well.

[5838] By Mr. FRICANO:

Q. All right, sir.

Now did you know or were you aware, I should say, that originally United States Gypsum intended to announce its price increase not on November 17, but on November 15?

A. This is the first time I ever heard that.

Q. All right.

Do you know whether or not they intended to announce it in the Wall Street Journal, as you said about your decrease yesterday?

A. The first time I knew was when our man called from Chicago.

Q. What——

A. Mr. Wright.

Q. Did Mr. Wright tell anybody where he got that information?

Mr. DELONE. I object to the form of the question. What information?

Mr. FRICANO. Information relative to United States Gypsum's price announcement of an increase.

The COURT. You can answer that yes or no, either he told them or he didn't tell them, if you know.

The WITNESS. I'm halfway between. I don't know. I think he did, but I am not sure.

[5839] The COURT. All right.

By Mr. FRICANO:

Q. What do you recall, sir?

The COURT. He told you he thinks he did.

The WITNESS. I think he did.

Mr. FRICANO. I wanted to find out if he remembers what was said.

The COURT. That is exactly what you can't ask him, what was said. That is exactly why I said he can answer yes or no.

By Mr. FRICANO:

Q. Well, did your man in Chicago, Mr. Wright, did you say?

A. Yes, sir.

Q. Did he ever send the information to you?

A. Yes, he did.

Q. Did he send it promptly?

A. As I recall, he did, yes.

Q. If he got it on November 17th, in point of fact, he kept it in the office for a day and a half before he sent it out airmail special delivery?

A. I don't know that.

Mr. FRICANO. May the witness have 520, please.

[5840] By Mr. FRICANO:

Q. Can you identify this sheaf of documents, sir, paying particular attention to the last page?

A. The copy of the envelope?

Q. Yes, sir.

A. Yes, sir, there is a copy of an envelope, National Gypsum Company envelope addressed to Mr. J. P. Hayes of our company.

Q. Was Mr. Hayes the man Mr. Wright spoke to?

A. Yes, he is.

Q. That is the man in Chicago, Mr. Wright?

A. Yes, he was.

Q. Are these the documents and is this the envelope he sent from Chicago?

A. It appears to be, yes.

Q. The telephone call was November 17, was it not?

A. The call was November 17, yes.

Q. According to your testimony?

A. Yes, sir.

Q. And this was an important matter, because you had a timetable set up, did you not?

A. We didn't have a timetable set up.

Q. What is that?

A. That was after we heard about the call, yes.

• • • • •

[5852] • • •

Q. Now, isn't it fair to say that when you first learned of the price increase you really thought it was going to be on December 19, not December 15?

A. Couldn't have thought that at all.

Q. Without having some advance information?

A. When Mr. Wright called on the 17th, he told Mr. Hayes what it was all about, and certainly we wouldn't guess after Mr. Reith told him what was in USG's notice.

• • • • •

[5880] • • •

Mr. FRICANO. This document shows that, on November 16, 1965, Mr. Colon Brown was a guest of the Drake Hotel in Chicago.

Mr. DELONE. I would ask that what it shows, what he was doing there, also be read to the jury.

Mr. FRICANO. I will, Your Honor.

On November 15, the entry is, "Chicago, Illinois," and it says, "Portland Cement Association Directors meeting, company plane."

By Mr. FRICANO:

Q. Well, what does that mean, "company plane"? Do you know, Mr. Atwell?

A. We have a company plane, our corporation.

Q. Do you know, from time to time, if Mr. Colon Brown uses that plane?

Mr. DELONE. Stipulate to that.

The COURT. What is Mr. Colon Brown's position?

Mr. FRICANO. Chairman of the board, sir.

The COURT. All right. I would assume that the chairman of the board, once in a while, uses the company plane.

Mr. FRICANO. Yes, sir, Your Honor.

• • • • •

[5887] • • •

Mr. FRICANO. With the Court's permission, [5888] I will read this to the jury. This is handwriting.

Mr. DeLone. I will stipulate it is Rollie Campbell's handwriting.

Mr. Fricano. In Mr. Rollie Campbell's handwriting of the National Gypsum Company, the credit man on the West Coast.

On the top it says "Terms." And then the date, March 9, 1966.

> Talked to Chuck Hamilton of USG. He has heard no rumors at all regarding any break in the terms, at least not among any of the major companies.

By Mr. Fricano:

Q. Mr. Atwell——

A. Yes, sir.

Q. Is that a verification?

A. I don't know whether it is a verification or not. I don't know anything about what Rollie did.

Q. Well, it certainly doesn't deal with a specific account; does it?

A. It doesn't sound like it.

• • • • •

[5929] Q. Mr. Atwell, during the years 1966 and 1967, did you sell your product, gypsum wallboard, exclusively at list prices?

A. That was our policy. Insofar as I knew, we did, yes, sir.

Q. All right, sir.

Now, how about 1968?

A. No, not the entire year of '68.

Q. How long into the year did you sell exclusively at list prices?

A. I think——

Q. Keeping in mind you had a price increase on September 16, 1968?

A. I think that we were selling at below our list prices early in 1968, as early as January.

Q. Throughout the country?

A. I couldn't say throughout the country.

Q. That was only in small parts, wasn't it?

A. It was in individual cases, yes.

Q. Is it fair to state throughout the year 1968 while there was discounting from your list prices, it was not very great?

A. No. I don't remember it quite that way. I think [5930] it might have been true at the beginning of the year, but toward the end of the year I think it was rather great.

Q. All right, sir.

When you started the discounting were you discounting from higher prices?

Mr. DeLone. Objected to. Higher than what?

Mr. Fricano. Higher than the prices that existed in 1967.

The Witness. We would discount from the list price, so where the list was higher in 1968 than in 1967, that would be the fact, yes.

• • • • •

[5931] Q. Now, you have testified, Mr. Atwell, that you stopped verifying with competitors in 1969, did you not?

A. Yes, I did.

Q. You also testified, though, that you recall a document which you sent to two of your subordinates, Earl Kroth and Dan Webster, telling them if they were doing it they shouldn't do it; is that right?

A. I don't know that the wording was exactly that way.

Q. What do you recall about it, sir?

A. I think I told them that I may not have advised them that as of January 1, we—that I stopped verifying prices, and that they in no way were to do it.

Q. And you didn't write this memorandum until December of 1969, did you?

A. That is correct.

Q. Now, Mr. Atwell——

The Court. Do I understand what you [5932] are saying is that you quit in January, 1969, and you wrote such a memorandum to some of your subordinates in December of 1969?

A. That is right, sir; that is right.

• • • • •

[5935] • • •

Q. Did National Gypsum Company from time to time invoice at list prices when in point of fact it was selling the product to the customer at less than the prices appearing on the invoice?

A. Yes.

Q. Why do you do that?

A. Mostly at the request of the customer.

Q. Well, were there any other reasons?

A. Well, at one time—I don't know what time it was—for a very short time, I think we decided when we were meeting prices we would put it on credits rather than invoices, but that didn't last. I would say that was for a short period of time. I don't know how long that was. But since then we have issued credit from the face of our invoices at the customer's request.

Q. How about cashiers' checks?

A. No.

Q. You never issued a cashier's check?

A. I never remember one, no, sir.

Q. Well, Mr. Atwell, wasn't one of the reasons why you didn't show the actual prices on the invoice so that other dealers in the marketing area would not get that information?

[5936]

Mr. DeLone. I object to the form of the question. The witness has not indicated they didn't. He said normally they did as I understand it.

The Court. May we have the question, please.

[The question was read.]

The Court. Can you answer it? Was it or wasn't it?

The Witness. I don't think that was a reason, no.

By Mr. Fricano:

Q. You better take a look at GX 34. While we are doing that, Mr. Atwell——

A. Yes.

Q.—did you give special discounts to key customers?

A. Special discounts—you mean price discounts to key customers?

Q. Yes, sir.

A. We may have for competitive reasons, yes, sir.

Q. Only for competitive reasons?

A. I don't recall any other reason.

Q. Well, from time to time didn't you have a lower price to to a large volume purchaser where you were not meeting any other competition?

A. No, no, sir. That would have defeated everything [5937] I was trying to do.

Q. Do you have Exhibit 34?

A. Yes, I do.

Q. Can you identify that?

A. It is a letter from Tom R. Avant of our company to Mr. Jack Hayes who is in Chicago, central sales manager.

Mr. Fricano. I offer the exhibit.

Mr. DeLone. No objection.

The Court. Admitted.

[Government Exhibit No. 34 was received in evidence.]

By Mr. Fricano:

Q. Mr. Avant's letter to Mr. Hayes, subject Herrman Lumber Company, Springfield, Missouri. It is dated April 23, 1965.

Dear Jack:

Attached is the Request to Meet Competition that we discussed regarding Herrman Lumber Company whose General Offices are in Springfield, Missouri. Due to the fact that there is a considerable difference between the price that we are meeting for this customer and our published price, I do not want these prices to appear on the face of the invoice.

[5938] • • • • •

As we discussed, you will handle this with Mr. Atwell and he will handle this in his department through internal credit so that the prices shown will reflect in a monthly credit memo with itemized statement attached showing date of shipment, invoice number, and location for each of the Herrman yards. It is very important that Ken set this up and acknowledge it to me so that I know that it is being handled in the manner in which we have discussed.

[5939] By Mr. Fricano:

Q. Now Mr. Atwell——

A. Yes.

Q. This indicates—does it not—that the reason for doing it, for not using the real price on the invoice, was so that price wouldn't spread to the marketplace; is that not correct?

A. I wouldn't be surprised that would be a good reason, yes.

Q. Why didn't you give it to us before?

A. What? No, no. I think you asked me if it was to hide it from customers.

Q. Is there a difference?

A. Well, yes, there is.

Q. Well, what is that difference, sir?

A. Well, it would be much more likely that competitive salesmen would see this than a customer of a competitor.

Q. And if a competitive salesman saw it, what would happen?

A. Well, I don't know what would happen. I mean, it is conjecture, but I know what would happen.

Q. He would report it back to the home office?

A. Oh, yeah, yeah.

Q. If the home office called you, you'd tell them what the truth was?

[5940] A. If he asked me during that period of time.

Q. So why go through the charade?

A. Well, I don't know why. You are trying—You are asking me to justify this. I told you all I know about it.

• • • • •

[5984] CROSS-EXAMINATION

By Mr. DeLone:

Q. You were asked a number of questions about verifying prices that were reported up to you from the field, verifying them with competitors. You recall some questions about that, I——

A. Yes, I do.

Q. —I assume?

A. Yes.

Q. As I—I withdraw that. These reports that came from the field came to you in some forms you have seen here, called "Requests to meet competition;" did they not?

A. Yes.

Q. And did you, whenever you received or inquired of [5985] a lower price that had been offered to a customer or potential customer by some competitor, whenever you received such a report, did you always verify with the competitor to determine whether or not it was true?

A. No. That was only a small portion of the requests, I verified.

[5986] By Mr. DeLone:

Q. Do you have any idea or way of estimating in round figures approximately how many of these requests to meet competition you may have received or came to your department in the year 1965, which has been described as a very bad year?

A. Yes. We made a survey and I saw them. I saw the results of the survey in papers here recently.

In 1965 we had 40,000 requests to meet competition forms come into our department.

Q. Now, of that number of requests, do you know approximately how many were authorized, where you authorized the sales people to offer the lower price to meet the competition?

A. Around 80 per cent.

Q. And if the—well, what was, if you know—approximately how often in the year, 1969, if you remember, approximately how often did you have occasion to verify one of these reports that came in from the field?

By verify I mean now, verifying by calling a competitor.

A. In 1965, which was the heaviest period that I can recall on verification, we verified between, oh, nothing and five or six reports a week.

Q. And the balance of the 40,000 were dealt with one [5987] way or another, without calling a competitor, is that correct?

A. Oh, yeah, competitive invoices or believing the customer or things like that.

Q. How did you verify the report the customer made was true, except by calling your competition? What other methods did you have?

A. Well, we request of our salesmen right now, and did then, to send us whatever documentation he could get from the field and those would be competitive invoices, or to get a customer to sign these RTMC's or requests to meet competition forms or get a letter from a customer. And in some cases we just believed the customer, because we have never—we have always found him to be trustworthy.

Q. Did you ever have occasion to—you, Mr. Atwell, when you were passing on one of these requests to meet competition, did you ever have occasion to check back with your field sales

people who had reported the situation to find out whether they could assure you of its reliability or accuracy?

A. You mean after I got a request from them, did I contact them again?

Q. Yes.

A. Oh, yes. I was on the phone with them regularly, yes.

[5988] Q. When you called back to them, did you always make notes of your conversations with them?

A. No, I didn't make any notes.

Q. What did you, on these forms, if the request was approved, those that came to you, you have to sign to indicate your approval or not, I guess, didn't you?

A. Well, if I approved it, I signed it. And I think in most of the cases where we didn't approve it, we wrote reject on the face of the document, as I recall.

Q. Now, in those instances when you did call a competitor——

A. Sorry.

Q. Are you all right?

A. I'm all right.

Q. The mike is still working, too.

A. Yes, it is. It doesn't have a sore throat, though.

The COURT. Do you have a sore throat?

The WITNESS. Yes, I do, but I think I am going to make it all right.

By Mr. DELONE:

Q. In those instances where you did call a competitor out of, say, in 1965, out of these 40,000 requests, where you called a competitor sometime between zero and six times a week, why did you in those certain limited number of [5989] cases call the competitor to inquire about the offer, the report that had come up to you from the field?

A. Those were the reports where I had very serious doubts about the type of report, the veracity of the dealer. Sometimes I felt that the dealer was untrustworthy, so I decided I would protect our company by checking them.

Q. Protect your company from what?

A. Against illegal discrimination among our customers in the field.

Q. What do you mean illegal discrimination?

A. If we had a report of a low price and I didn't do my very best to try to make sure that that report was true and I gave that and didn't give it to the rest of my customers, I would be discriminating against my other customers.

Q. And wasn't your understanding—was it your understanding, whether or not it was right, that it would be unlawful to so discriminate against other customers?

A. Yes, it was.

Q. Have you been advised about any statute or laws that concern this subject?

A. Yes.

Mr. FRICANO. Objection, Your Honor.

The COURT. The basis?

Mr. FRICANO. He is asking a layman [5990] about the law now.

Mr. DELONE: I didn't ask him the content of the law. I asked if he had been advised about the law.

The COURT. You can answer.

The WITNESS. Yes, sir. I was told about the Robinson-Patman Act.

• • • • •

[6011] • • •

Mr. DELONE: All right. "Below—"

May 24, 1967.

> Below, I am quoting a letter which W. W. Gerber sent to the three division managers in his area, Avant, Stewart, and Wright. I think it is a good letter, and it gives you some food for thought and also some sales features to use with our customers.
>
> "Our company has taken a bold and strong stand toward protecting its position in the marketplace.
>
> "The action of Monday, May 15, can be traced directly to you and to the district level of management. A careful review and study of my files will reveal every district and division in the central region is on record that we were losing business to spot competition.
>
> "And, almost without exception, all field management levels urged the company management to take a firm stand. This has been done.

"Being fully aware of our company policy on price, you can easily understand the route we took. This very knowledge of our policy had to be part of your original recommendations for action, and you could most certainly have second guessed the company's action.

"Initial reports of reaction indicate large [6012] key dealers are reacting unfavorably, this based on their feeling they should enjoy an advantage. This was anticipated.

"The question is, will we capitalize to the enth degree on the action we have taken?

"When the marketplace is equal, we have advantages no other company—and I include USG—can offer:

"1. A professionally trained sales force.

"2. A multiple line.

"3. Research and development.

"4. Profit orientation.

"5. Strategic plant—warehouse—locations.

"It is our responsibility to our field sales force to motivate them to what could be the top possible earnings in the building materials business.

"No competitor can offer all five of the above advantages. These make for profit to our own people, and yet more important, to all of our good dealer customers."

And that is the end of the quoted material, quoted from Mr. Gerber's letter, and then Mr. Nicely goes on:

> In addition to what Bill has said, it is the feeling here in Buffalo that we must stay within the legal limits of the law, and that is the basic [6013] reason we did not attempt to meet competitive activities on a spot basis. To have done so would have surely caused us to be guilty of illegal discrimination.
>
> I know you face large customers every day who are convinced they should have a better price than a small customer and who are convinced they are going to find a way to get it. To meet this type of argument, I think you need only say they might have some justification to a better price because of their large volume; however, our legal counsel interprets the law as it is now written that we cannot offer a better price based upon volume.

> In the past few months, the government has been extremely critical and watchful of violations of the Robinson-Patman Act. No one knows better than we do, because we are engaged in four or five legal battles caused by what some dealers and contractors have classified as "illegal discrimination."
>
> Since December 15, 1965, our company has not varied one penny from the published price list on gypsum products, and it is our intention to keep our published price list as the only basis for selling.

And the next document, Mr. Atwell's memorandum of [6014] March 4, 1966, and I think Your Honor indicated I should read the whole document, or Mr. Fricano requested——

The COURT. He asked it, and, because of his voice, I am asking you to do it. However, you may pass it back down to your associate.

Mr. DELONE. I am perfectly glad to keep going for a little while longer, sir. Thank you.

This is entitled, "Antitrust Responsibilities of Management," dated March 4, 1966.

> This week, Jay Nicely and I had the privilege of attending an Antitrust Seminar in New York conducted by the National Industrial Conference Board, Inc.
>
> Although we are sure you are familiar with our management's attitude concerning antitrust law, after attending this seminar, we felt a restatement of these policies occasionally is advisable.
>
> We were surprised to learn it is possible some companies are hostile to antitrust laws. This we cannot understand because these are the laws of the land which promote free enterprise for the good of consumers.
>
> We feel, and always have felt, it is our legal, moral and ethical responsibility to observe and comply with all antitrust laws to the best of [6015] our knowledge and ability.
>
> It comes to mind that, on occasion, a competitor may call to purchase a product from us which they do not manufacture. Likewise, some of you may talk to a competitor involving the purchase of one of their products to complete our line. Of course, these procedures are not illegal.

However, we wish to remind you that you should in no way ask about any of their price intentions, what they plan to do about price, or enter into any agreement on prices, whether it is on the resale of the product they buy or on prices of their other products.

In turn, you should refrain from discussing or divulging any price plans we may have under consideration. We realize, at times, it is human nature to discuss what we believe we know is going to happen with prices or policies as it seems to give us some personal prestige, but such personal gains could be opposed to corporate rules.

We have had good experience in picking up price sheets and getting verbal information from the field on most competitive activities, and, likewise, we have maintained a fairly good file of these situations.

* * * * *

[6021] * * *

Unless you want me to read anything further in there, Mr. Fricano, I thought I would turn—or anyone else—I would turn to the bottom of page 6 labelled Procedures.

The following guides to the administration of this policy are designed to protect the company against violations and appearance of violations of the antitrust laws, and to explain what the company can do in pursuing its lawful competitive objectives.

Then under the heading of what you can't do:

Agree or have any understanding with a competitor as to prices, terms, or conditions of sale.

Under the heading what you can do:

Establish your own prices, terms and conditions of sale, in the exercise of independent business judgement, taking into consideration an up-to-the-minutes knowledge of competitors' past actions and your appraisal of their probable responses, including possible economic retaliation. It is not proper to have your competitors' price lists in your possession—get them preferably

—and it is underlined——

from the customer level or from the competitor—without discussion or comment—after he has issued them to the trade. It is proper to keep a running check, at [6022] the customer level, on competitors' activities and to report them. The law neither requires nor contemplates that the required independent action shall take place in a vacuum.

Then page 8, as it existed at the issue date on 12–1–67, December 1, 1967, under what you can't do:

Discuss prospective prices, terms or conditions of sale, with a competitor; or complain to a competitor about his price cutting or listen to his complaint about your prices, terms, or conditions of sale.

Under the heading what you can do:

Find out, at the customer level, what prices, terms, or conditions of sale a competitor has charged or quoted, or is presently charging or quoting to a specific customer. Information supplied by the customer or prospective customer may not always be accurate, and additional confirmation may be necessary. It is not unlawful to check directly with a competitor—but without comment or discussion of any kind

—underscored—

about a past or present fact—what prices, terms or conditions of sale he has charged or quoted—but it is dangerous because of adverse inferences which may be drawn from any competitor contact on these subjects. However, if information or rumor at the customer level indicates a significant [6023] price change may be occurring, direct confirmation of past actions, at the competitor level, without comment or discussion of any kind

—underscored—

may be preferable, in spite of possible adverse inferences, to the loss of business which may occur if the company does not promptly confirm and take its own independent action. Such contacts may be made only by persons authorized by management and who will have direct responsibility to keep such contacts limited and lawful.

And that page, as has been indicated by the witness, was then rewritten and put into this policy in 1969 so that beginning in 1969 it reads as follows: —it doesn't say the date when it begins in 1969. The issue date is just 1969. Now it says, the new page 8,

> What you can't do:
>
> Discuss past, present or prospective prices, terms, or conditions of sale with a competitor; or complain to a competitor about his price cutting or listen to his complaint about your prices, terms or conditions of sale.

Going on under what you can't do:

> As a result of a 1969 Supreme Court decision, any exchange of price information with a competitor, and even the verification of a competitor's existing [6024] prices by direct contact with a competitor may be unlawful.

• • • • •

[Discussion]

[6038] • • •

The Court. Yes. May I call your attention, Mr. DeLone, though, to what Exhibit 15 says? The first paragraph is not—doesn't give me any trouble, then, but it refers to the conference with the lawyers. Then, they quoted the section of the Robinson-Patman Act which upholds our theory. However, they brought to our attention, also, a receent decision by the United States Circuit Court and the only one squarely deciding the precise issue; that is, the Sunshine Biscuit case. Then, they go on to say that the FTC argued Section 2(b) of the Robinson-Patman Act is limited in its scope. Then, it goes on with—the FTC examiner ruled otherwise. Then, it goes into the Circuit Court didn't agree with the FTC, and now it is all in doubt until the Supreme Court acts.

Now, to give that to a lay jury is pretty heavy stuff.

• • • • •

[6040] • • •

Mr. Fricano. May I read the statement, Your Honor?

I don't wish to quarrel with Mr. DeLone whether—as to whether or not what he reads accurately reflects the two documents. Mr. DeLone is a man for whom I have great respect, and that is not my argument.

My quarrel with him—my quarrel is with the thrust and the motion not only of the two documents but of this type of a defense in the case, generally.

As this Court is well aware, far better than I, this is a general intent crime. Good motives, good intent, whether Mr. Atwell consulted with his lawyers, whether he consulted with the Attorney General, is not relevant to a Section 1 Sherman Act crime.

The Court. I am not going as far as that last one.

Mr. Fricano. Well, to put in documents of this type and character, I suspect, probably would make relevant the documents which I have in my file, which I have written, and which others in the Department of Justice have written, saying this is no defense, that the Sunshine [6041] case is wrong, or that seeking legal advice of an attorney of record or attorney for a corporation absolves one for having committed a Section 1 crime.

I still respectfully represent to this Court that this is not relevant material to these issues.

The Court. Well, it has a relevance, I think, to this extent: that, if the Defendants contend—as I understand their contention—that these calls were solely for the purpose of avoiding a violation of Robinson-Patman and not in any way connected with stabilizing the market, that is their contention, as I understand it——

Mr. Fricano. That is correct.

The Court. Not that this is a defense because, clearly, it isn't a defense. There is no specific intent required, and, if they were using it to stabilize ——

Mr. Fricano. Prices.

The Court [continuing]. Prices, then it would be an offense, even though the Robinson-Patman Act were involved. But if, on the other hand, they weren't using it to stabilize prices and were using it solely for that purpose, then that goes not, as I see—not to the question of specific intent, but it has some probative value as to whether or not it was being used at all to stabilize prices.

Now, I suspect that you are going to give me a [6042] point for charge, if we get to the point where I have to charge, in which you are going to ask me to charge the jury that the Sherman Act requires no specific intent, and it is no—if they—

even though they had a perfectly good intent, if the effect of it was to stabilize prices, then it is no defense, even though that might have been what they intend to do.

[6043] Mr. FRICANO. Your Honor has a crystal ball.

The COURT. I think that doesn't take much of one.

Mr. FRICANO. I mean, that is obvious.

The COURT. I will charge that way probably. I don't want to say now how I am going to charge the jury, because we are not there. But on the other hand, I think the jury has a right to consider whether or not the so-called verification calls were being used to have any stabilizing effect, and if they were, even though, as they said in Container, even though it was not very frequent or not very often, it would still be a violation.

Mr. FRICANO. Yes, Your Honor.

The COURT. So I think the matter is probative. If you agree that statement Mr. DeLone has given you does accurately describe the two documents, I will have no objection to it being read to the jury.

Mr. FRICANO. Why can't we chart a center course, if we might? I would have no objection on the basis of the Court's reasoning here to the possible relevancy of this kind of data for the jury's consideration, if Mr. Atwell were simply asked did you in 1964 consult your attorney to ascertain whether or not your corporation, given a specific limited circumstance, review of this [6044] document, whether or not that violated the Robinson-Patman Act. Did you get this advice in 1964, yes or no? Then ask him in 1965 concerning the same matter, yes or no, and leave it go at that. What is wrong with that?

Mr. DELONE. The one thing that is wrong with that, it renews the force of the fact we have a contemporaneous written confirmation of the fact he was in consultation with counsel, and what I have proposed, to which Mr. Fricano does not agree, it covers the whole subject matter. I mean, he doesn't dissent from the description of the document. They can be in the record. They are not read to the jury. They can go to the jury.

The COURT. He doesn't dissent.

Mr. DELONE. He doesn't dissent to what the documents show, but he wants to say, as he has more than once suggested, the Robinson-Patman Act is a sham, and we offer the documents, as Your Honor perceives, to show it is not.

The COURT. I don't know that he says that it was a sham so much as he says it is for more than one purpose. When I said what I said, I want to be perfectly clear, I want to be certain I am not now saying that is how I am going to charge the jury. We will worry about that when the time comes.

Mr. DELONE. I understand that and I [6045] would have something I would like to urge on you different from what you said.

The COURT. Of course. I am giving tentative thinking for the purpose of discussing that stipulation, and I wouldn't want to be considered bound by what I say off the cuff, off the top of my head. I think I want to give more thought to the way I will charge than just decide it on the spur of the moment. I wouldn't want anyone to feel I made a commitment or I am estopped from charging some other way. I have no intention to do that by saying what I am saying.

All right, now.

* * * * *

[6051] • • •

Mr. DELONE. Your Honor had asked for a brief memorandum from both parties on whether the reference in one document that was in the other day, I have forgotten the number, now, National Gypsum Exhibit 17, opened up the question of the West Coast litigation, and I do have such memorandum which I would hand up to you, sir. I don't have a backer on it. I hope that's all right.

The COURT. That's all right.

Mr. DELONE. It was done in some haste.

The COURT. You are going to furnish me one, too, Mr. Fricano?

Mr. FRICANO. Any moment now somebody, I hope, is going to come through that door with a memorandum, Your Honor.

The COURT. All right.

Now, until something is decided on that subject, there should not be any reference to the West Coast litigation.

Mr. FRICANO. I understand, Your Honor.

[6053] • • •

CROSS-EXAMINATION (RESUMED)

By Mr. DeLone:

Q. Mr. Atwell, during the course of your testimony last week, you made reference to certain—I guess I would call them intraindustry sales, sales by National Gypsum to one of its competitors or purchases by National Gypsum from one of its competitors, and your responsibilities in that regard.

As I remember, you mentioned that you assumed the overall responsibility for that, for what I refer to as intraindustry sales, in 1969.

Had you been involved prior to 1969 in such transactions between gypsum wallboard companies?

A. Yes, I have.

Q. And had Mr. John Brown during his, let's say from 1960 until the time he left National Gypsum in September of '66, had Mr. John Brown been involved in such transactions?

[6054] A. Yes. That was his responsibility, one of them.

Q. Was he in overall charge, then of what I have refered to as intraindustry sales?

A. Yes.

Q. And did you assist or work with Mr. Brown in that connection, with Mr. John Brown?

A. Yes, I did most of the administrative work.

* * * * *

[6071] Q. Then, take the period from 1966, after Mr. Brown left, which was—I think it has been said it was around September of '66 up until January of 1969, because you have already testified that, based on what counsel told you, you stopped verifying in January, 1969—who was verifying—who was authorized to verify in this period, 1966 to January, 1969?

A. Well, I did the verifying, and I don't know of anyone else that did it.

Q. Did Mr. Nicely have authority to make such calls? Was he your superior?

A. Yes, he was my superior. He had the authority, but I never heard of him making one.

Q. All right. What about the credit people? Were there occasions when the credit people made verification calls, to your

knowledge, with reference to special terms or credit terms which involved a competitive situation?

[6072] A. Yes.

Q. Now, when you stopped verifying in January of 1969 you told us, because of what counsel had told you about decisions and so forth in the Container case, did you discuss that with anyone besides counsel, or did anyone else in the company discuss it with you, besides counsel?

A. Well, Jay Nicely discussed it with me, yes.

Q. When did you discuss it with Mr. Nicely?

A. Well, I don't—I can't give you a specific time. I know that, when counsel called me on whatever day it was, Jay Nicely called me at some later time. Now, it may have been the same date, or it may have been the next day. The reason I think it was near the time I talked to counsel is, when Jay called me from out of town, he said he had just read something about this in the Wall Street Journal.

Q. And what was the gist of your discussion with Mr. Nicely, as best you recall it?

A. Well, Jay talked about the article, and he said that——

Q. The article in the Wall Street Journal?

A. In the Wall Street Journal; and he said that he thought that it would be advisable for us to cease and desist, and I told him I had already talked to counsel and already made the decision.

Q. Now——

[6073] The Court. Cease and desist from what?

The Witness. Well, stop making verification calls.

By. Mr. DeLone:

Q. Now, except for the credit—you weren't responsible for the Credit Department and its activities; were you?

A. No.

Q. And that wasn't under your decision?

A. No, it wasn't.

* * * * *

[6076] Q. I show you also Government Exhibit 25. Do you have that there? Maybe I didn't ask for that yet.

A. I don't have it.

Q. Sorry.

What is that exhibit, Mr. Atwell?

A. This is a letter I wrote to Mr. Hayes and Mr. Nicely on December 12, 1969, and the subject is "Price Verification."

Mr. DeLone. Again, this is marked a Government exhibit. I will offer it.

Mr. Fricano. I will offer it, Your Honor.

Mr. DeLone. If Mr. Fricano wants to offer it, that is fine.

The Court. It is admitted.

[Government Exhibit No. 25 was received in evidence.]

Mr. DeLone. This document is dated December 12, 1969, from Mr. Atwell, subject, "Price [6077] Verification," directed to J. P. Hayes, Vice President, J. P. Nicely, Vice President, reads as follows:

> Dear Jack and Jay:
>
> I believe I did advise you men of the following action taken by me early this year to stop price verification calls in the building products division of our company. I am not sure Colon was ever made aware of this decision. As chief executive of our company, I think he should have this information. If you agree, please route the extra copy to Colon.
>
> As you know, I have been in constant touch with outside counsel for several years regarding antitrust regulations. Very early this year, counsel advised me of the decisions in the Container case and emphasized the telephone price verification aspect of that case. Even though this activity in the Container case is significantly unlike that which was infrequently used by us, we were advised that until clarification of the Container decision, "serious consideration should immediately be given to complete cessation of verification calls." Based on this counseling, and only as a result of this counseling, I have made no verification calls since some time in January, 1969.
>
> We, at National Gypsum Company, know we did not violate our internal antitrust policies nor the laws [6078] of the land as regard to antitrust. We did not discuss future prices, policies, terms or conditions of sale with any competitor, nor did we enter into, or discuss, any agreements on any of these items, nor on distribution, sharing of markets, selection of customers, etc. We simply answered specific inquiries with a yes or no and only inquired about specific reports received from our sales force of competitive activity. I am knowledgeable of the above because I believe I am the only one who made any of the occasional verification calls by our building products division in many years.
>
> However, making the above decision doesn't necessarily lead me to believe we have no other concern. To the contrary, I continue to be concerned about possible inadvertent violations of the Robinson-Patman Act. We have done our best in good faith to make our decisions in meeting competitive situations on whatever evidence was available. There may have been cases where we were deceived by customers, and as a result, met false competitive reports. This leaves a question in my mind as to whether or not we have exercised every precaution legally obtainable. This kind of decision making will be a risk that, in our division, we will continue to take until we get further clarification of the legality of telephone price verification calls where the purposes thereof are to avoid fraud and to obey the federal laws against price discrimination among customers.
>
> K. H. Atwell

[6079] The Court. What is the date of that?

Mr. DeLone. December 12, 1969.

By Mr. DeLone:

Q. Mr. Atwell, might I ask you, this makes mention of Colon and refers to Colon as chief executive officer. I take it that is Colon Brown?

A. Yes, it is.

Q. Do you recall why you wrote, what occasion you are writing this letter to Mr. Hayes and Mr. Nicely in December, 1969?

A. Well——

Q. December 12, 1969, to be precise.

A. Mr. Colon Brown and Mr. Jack Hayes were going to be called as witnesses in some litigation and although I don't ever recall telling Mr. Colon Brown about price verification, the complaint in 1967 that led to this litigation had as one of its items price verification. So it was, I assumed, of course, since it was a complaint which Mr. Colon Brown knew about the price verification, but I didn't know how much he knew, if anything, about us stopping verification.

Q. Now you say because of the complaint. Do you mean that you assumed he was aware of verification as you had conducted it in the past, because this was the subject [6080] matter of some litigation that you recall?

A. I assumed that.

Q. And it was in whatever that litigation was, such litigation that he and Mr. Hayes were about to testify?

A. Right.

Q. And then do I—is it correct to say you wanted to be sure he had the up-to-date accurate information before he testified?

A. That is correct.

The COURT. Do you know whether or not Mr. Nicely and Mr. Hayes did give that information to Mr. Colon Brown?

The WITNESS. No, I didn't know for sure.

The COURT. I mean do you know now.

The WITNESS. Do I know whether they did? No, I don't.

The COURT. All right.

By Mr. DELONE:

Q. Do you have any recollection one way or the other as to whether or not you ever talked directly to Mr. Brown about the practice of verification when you were verifying?

A. I wouldn't have been reluctant to, but I don't recall talking to him about it.

[6081] Q. You don't recall? You may have, you may not have?

A. I may have, may not have.

* * * * *

[6084] Q. Now, one of the documents that I read to you a moment ago made reference to your having been in constant touch with outside counsel regarding antitrust regulations.

Did you with frequency consult with outside counsel about what you were doing in order to try to comply with the Robinson-Patman Act?

Mr. FRICANO. Objection, relevancy and materiality.

The COURT. Let me listen to that again, please.

[Question read.]

The COURT. You can answer the question, and at the appropriate time I will charge the jury as to the effect of any such conferences with counsel.

The WITNESS. I did and still do.

[6085] Mr. DELONE. May the witness have, please, National Gypsum Exhibit 19?

The WITNESS. Did you say 19, sir?

Mr. DELONE. Yes.

The WITNESS. 19.

Mr. DELONE. I am sorry, Mr. Grainer. I forget how many boxes you have up there.

The COURT. I am going to make an exception in my rule of no side bars, and I just want to see Mr. Fricano and Mr. DeLone a moment at side bar.

[Whereupon, an off the record side bar discussion was had out of the hearing of the jury.]

[Whereupon, the side bar discussion was concluded and the following took place in open court.]

Mr. DELONE. Do you want those two documents, sir? That's 15 and 16. The Judge would like to have them before him.

The COURT. Ladies and gentlemen of the jury, by agreement between counsel for the Government and counsel for National Gypsum, I want to advise you that there is written corroboration by a letter in 1964 and a letter in 1965 of the consultation between National Gypsum and their counsel concerning the Robinson-Patman Act.

With that stipulation, the admission of DXNG 15 and 16 is withdrawn.

[6086] Mr. DELONE. I would just ask Your Honor to name the author of two documents.

The COURT. Mr. Atwell was the author of the two documents.

Mr. DELONE. Now,——

The COURT. Now, do you withdraw your proffer of exhibits, National Gypsum Exhibits 15 and 16?

Mr. DeLone. Yes, sir, in light of the explanation, I think that covers the point.

Mr. Fricano. One further point, Your Honor, just for the record.

The Court. Now, does any other counsel object to what I have stated?

All right, There is none.

Mr. Fricano. While I have stipulated to the one contact in '64 and the one contact in '65 with counsel——

The Court. The communications of 1964 and 1965. I don't want to go beyond that.

Mr. Fricano. All right. No, my point is this: That while that is an agreement, that is not to say that my standing objection with respect to the materiality and relevancy of any contacts between Mr. Atwell and his attorneys concerning the Robinson-Patman Act are outside the issues of this case.

• • • • •

[6096] By Mr. DeLone:

Q. Now, Mr. Fricano earlier called your attention to a memorandum which you had written on October 25, 1968 in which—among other cautions—you mention to your sales—or to whoever received the document you had written—do not write notes or letters to competitors—I am sorry.

Call your attention to the statement in that memo, "Refrain from making notations on files or note pads regarding your conversations with competitors' employees."

When you wrote that, was that in connection with this same concern about the possibility that notations might be misunderstood?

A. Well, my concern always is incorrectly, inaccurately, notes could be misunderstood, yes.

Q. And in another of the documents that I just read you had expressed concern about shorthand expressions in letters or files. Was this also part of your concern, shorthand expressions?

A. Yes. Well, I didn't mean shorthand in the sense of shorthand, but I meant brief notes, inaccurate notes.

Q. Now, at the same time that you—I understand that this Government Exhibit 29 of October 25, 1968, bears the date of

October 25. It does not show any distribution [6097] list, although the October 28, 1968 document appears to refer back to it and that does have a distribution list. Do you remember the two documents I am talking about?

A. The talking notes that I had for regional managers?

Q. Yes. I think to be sure we better put GX 29 and GX 30 before you, and also National Gypsum Exhibit 23.

A. Yes, that's what I thought they were. Right.

Q. Now, GX 29, the document about which Mr. Fricano examined you——

A. Right.

Q. ——is what you referred to as "talking notes?"

A. Well, that's what I call them, yes.

Q. And do you know whether you distributed them on October 25?

Mr. Fricano. If Your Honor please, I think there is some confusion, understandable confusion. I think the witness may be looking at 30, GX 30.

The Witness. 30 is my correction of 29.

Mr. Fricano. All right.

If your Honor please, GX 30 is an exact copy of GX 29.

The Witness. I am sorry. 30A. I am sorry.

Mr. Fricano. That is where I am confused. The document to your immediate left, Mr. Atwell.

[6098] The Witness. That is 29.

Mr. Fricano. All right.

By Mr. DeLone:

Q. You have been talking about GX 29 as your talking notes; is that right?

A. That's what I refer to them as, yes.

Q. And GX 30A—if you have that—is something you sent out bearing a date three days later. Did that go to the people to whom you had given your talking notes?

A. This 30A were the people that were in the meeting, yes.

Q. And do you have National Gypsum Exhibit 23 there?

A. Yes, I do.

Q. And that's another memorandum dated October 25, 1968; is it not?

A. Yes, it is.

Q. Of which you are the author?

A. Yes, sir.

Q. And is that also talking notes, as you call it?

A. Well, since it isn't addressed to anyone, I consider them talking notes or memos to myself on giving a little talk, yes.

• • • • •

[6104] The COURT. Proceed, sir.

Mr. DELONE. Mr. Grainer, would you give the witness Government Exhibits 985, 986 and 988, please.

By Mr. DELONE:

Q. Mr. Atwell, while Mr. Grainer is getting those exhibits, I understand your earlier testimony to be to the effect that when you—never mind what I understand.

You testified earlier to the effect that when you made a verification call to check prices, to check a competitive situation with a competitor, you did not normally make notes of the call, although the action that you took on a request to meet competition was indicated by your approval on the form. Do you remember testifying that way?

A. Yes, I do.

Q. Where you made the call to a competitor, was there anyone else who had to know the result of that call before the decision was made whether or not to meet the competition as requested?

A. During the period when I had authority, there was no one else that needed to know, no, sir.

Q. How about when the competitive situation which had been reported to you from the field dealt with special terms as to credit, extended credit terms or special credit [6105] terms?

A. Well, if I received a request for competitive conditions, if I had some doubt about that, I would send them to the Credit Department and ask them to verify it.

Q. Now when you transmitted or when you asked the Credit Department to verify a report about credit terms, how did you communicate with the Credit Department?

A. Well, I think I have said that they're on the third floor and we are on the second floor and I would write a longhand note and send it up to them and ask them to verify it.

Q. So you would make a note of your request?

A. I wouldn't testify I made a note to every one, but I have done it. I don't know that I didn't take one up and ask them to verify it, but I did make notes and ask them to verify, also.

Q. Did you make any effort to conceal the fact that you were asking them to verify?

A. Oh, no, no, no.

Q. Would you look at Government Exhibit 985, which is a note which is already in evidence. That is one of your notes to Mr. Barber?

A. Yes, it is.

Q. Mr. Barber, now deceased, was at that time head of the Credit Department?

[6106] A. He was our manager, yes.

Q. And that note reads——

Are you able to tell me—are you able to, by looking at 985, including the request to meet competition form, are you able to date approximately when you wrote the note to Mr. Barber?

A. Well, the RTMC, or request to meet competition form, is dated June 6, 1968. That is from the field. And it was attached to a letter that Mr. Avant, of our company, wrote to Mr. Gerber on June 7, 1968.

Q. Would it be fair to say your note to Mr. Barber is shortly, or is it June, 1968, sometime after these documents came to you?

Mr. FRICANO. I will stipulate that, Your Honor.

The COURT. All right.

Mr. DELONE. Fine.

And the note reads:

> Bob Barber, Credit.
> Bob, would you please attempt to verify this.
> From the desk of K. Atwell.
> And signed Ken.

And you did, if you will look at 986, that is the answer, is it not, that you received pursuant to the request you had made to the Credit Department, to Mr. Barber [6107] to verify—do you have 986 there?

A. Yes, I just want to check it.

Yes, it is Cedar Rapids Lumber, yes.

Q. And that response from D. Kent—this is also in evidence, sir—dated June 14, 1968, from Regional Credit Manager, and it is signed by D. D. Kent?

A. He was the regional credit manager in Mr. Barber's department.

[6108] Q. And it was directed, initially, to Barber, and then his name is scratched out, and it was redirected to you.

A. That is right.

Q. And Mr. Kent then responded to your request in writing, giving you the information that you had asked or giving you the results of his verification call?

A. Right.

Q. And it says, "June 14. I spoke with Don Havertine, Regional Credit Manager, USG. They have no special cash discount terms established for this account."

And that, then, became part of your files in this respect; did it not?

A. I assume it did; yes.

Q. Well, I think it will be agreed that was produced from the files of the National Gypsum Company.

Mr. FRICANO. Yes, Your Honor. That was produced pursuant to Grand Jury subpoena

By Mr. DELONE:

Q. And do you now have Government Exhibit 988, there, Mr. Atwell?

A. Yes, I do.

Q. And, again, I think you will see that the first page of that exhibit is a note from Ken—on your note pad, "From the desk of K. H. Atwell," stating, "Bob Barber credit.

• • • • •

[6109] Would you please verify this," signed, "Ken."

And would it be correct that you sent, with that note, the attached report about a competitive offer to Volka Building Supply Corporation?

A. Well, I would have to send the file, because I didn't refer to it in my handwrttten note. Yes.

Q. And then there is a note at the bottom, signed by Mr. Griffith.

A. On my note, yes.

Q. On your note.

A. Yes.

Q. And does that report on the results of his verification of the Volka Building Supply Corporation, the competitive offers which you had asked to have them verify?

A. Right.

• • • • •

[6112] Now, was that a policy that was in force in March of 1967, or was that something that you were proposing for consideration at that time?

A. Well, our policy in 1967 was not to meet any competition, and this was in my talk here, I was recommending that we consider meeting the major competition, and the figures that I pointed out in here indicated that the minor competition hadn't hurt us too much, so I was recommending that we start putting—letting the bars down and meeting major competition.

Q. Were you experiencing at that time, then, competition from major competitors, sales at off list prices from major competitors, in March of 1967?

A. Yes.

Q. And was the recommendation which you made in—which you discussed and considered in GX 816 to meet the competition of major manufacturers on price and service, but not of minor competitors. Was that adopted?

A. Well, as I had testified earlier, around the middle of—what was—May of 1967, we finally did drop our price on half-inch board, two dollars a thousand, across the country.

Q. Across the country?

A. Well, as I remember it, yes.

Q. Nationwide, you mean?

[6113] A. Nationwide, as I remember it. Yes.

Q. Well, then, if you dropped the price two dollars, you dropped it—that pertained to major and minor competition, as well; didn't it?

A. Well, we dropped our price two dollars, and it was to meet competition at the time; yes.

Q. To meet whatever competition you were then experiencing, regardless of whether it came from major or minor competitors; is that right?

A. Whatever annoyed us at the time; yes.

• • • • •

[6114] • • •

By Mr. DeLone:

Q. National Gypsum Exhibit 28 is the announcement of this decrease that you just referred to in May of 1967, is it not, the announcement to your customers?

A. Yes, it is.

Q. And it reads—in pertinent part, it reads:

> To enable all our Gold Bond customers to be competitive with any individual account who may be receiving price discounts or other inducements from our competitors, we are reducing prices on some gypsum board machine products. We feel such a general reduction is more equitable than meeting spot competition and avoids possible price discrimination.
>
> Effective with shipments made on and after May 15, 15, 1967, our published prices will be reduced by amounts shown as follows.

And then it shows a series of reductions ranging from a dollar per thousand square feet to two thousand square feet, depending —to $2.50 per thousand square feet, depending on the particular type of wallboard. It is two dollars for half-inch and $2.50 for five-eights-inch, and a dollar for quarter-inch cream-face wallboard.

• • • • •

[6115] National Gypsum Exhibit 29 is your memorandum of May 13 to the dealers, to the salesmen, division managers, district managers, et cetera, concerning this same reduction; is it not?

A. Yes, it is.

Q. And it says, in part—encloses the document we have just read, and then says:

> "The action taken in this announcement was to meet price discounts and other inducements believed to have been made by competition to select accounts on an individual basis. To provide an equitable competitive position for our customers and avoid possible price discrimination, we chose to reduce published prices in this manner in preference to meeting specific situations.

So that, although there was what you described earlier as reasonable or relative stability of prices between December of 1965 and September of '68, at least, in this time, you were encountering—in May of '67, you were encountering price discounts, at least to selected accounts, in the field; were you not?

A. Yes. I had mentioned that we did go down in May of '67. Yes.

• • • • •

[6131] A. That is what I call them. Yes.

Q. And to whom would that presentation have been made, Mr. Atwell?

A. Well, the only thing I can say is October 28, 1968, I addressed my reference to these talking notes to certain people, so——

Q. And who were those people, Mr. Atwell?

A. Well, I wrote it to Mr. —I addressed it to Mr. J. P. Nicely, Mr. Gerber——

Q. And who is Mr. Gerber?

A. At that time, I think Mr. Gerber was—I am not sure. I think he was vice president of sales, at that time, or—yes. I think it was vice president.

Q. And then it was also addressed to Mr. Griffin. Who was Mr. Griffin?

A. Mr. Griffin and Mr. Phillips and Mr. Stewart were regional managers.

Q. I see. Now, would these talking notes have been used in a talk to regional managers?

A. Yes. I talk to the regional managers often.

• • • • •

[Re-direct Examination]

[6137] • • •

By Mr. Fricano:

Q. Yes. You said, "To my knowledge, no one of you have been authorized by management to discuss prices with competition, but it is quite evident that some of you do this." Did Mr. Gerber do it?

A. I don't know whether he did it or not.
Q. Yet, he was at this meeting; wasn't he?
A. He was at the meeting; yes.
Q. Did he have the authority to do what you had been doing?
A. What do you mean, verifying?
Q. Well, whatever—yes, verifying.
A. Not to my knowledge; no, sir.
Q. Did he get the authority as of October 25, 1968?
A. He did not.
Q. Was he about to be deposed on the west coast?
A. I don't know.
Q. Had Mr. Nicely already——
A. You mean Mr. Gerber?
Q. That's right.
A. I don't know.
Q. Had the deposition of Mr. Nicely already been [6138] taken on the west coast?

Mr. DeLone. Objection to the form of that question, in light of the Court's earlier ruling.

Mr. Fricano. I think this area is open, at this point, Your Honor.

Mr. DeLone. I thought Your Honor said we could consider that, and you have a memorandum from both sides submitted, and I didn't understand Your Honor to change the ground rules.

The Court. I did not change the rules. I have had it under consideration.

Mr. Fricano. This point does not include Mr. Atwell's testimony this morning that went into that subject at length without objection, on cross examination, by any defense counsel.

The Court. I asked all counsel not to make reference to that until I have ruled.

Mr. Fricano. I am sorry, Your Honor.

• • • • •

[6137] Mr. Mellot. If the Court please, may Georgia-Pacific have a continuing objection to any reference to the West Coast litigation in this proceeding?

The Court. You object to the basis of the ruling which I have made?

Mr. Mellott. Well, if Your Honor please, I want to avoid the necessity of getting up each time it is made and objecting to it.

The Court. That's right. You have a continuing objection. I have ruled that it may be referred to in the terms that I have stated, and not in detail, and [6158] not beyond that.

Mr. McSweeney. That would stand for all defendants, then, Your Honor?

The Court. Oh, yes. Once somebody has an objection, everybody has an objection.

Mr. Fricano. Can I just state for the record that when Mr. Atwell went into this in some length on cross-examination, there was no motion to strike by any defense counsel.

The Court. Well, what I have done is, since this is exactly the way it came out on Mr. Atwell's examination, and it came out not only there, but this has been done with numerous witnesses, and I am just saying, all right, that's the way we will do it from here on in.

Mr. DeLone. You are now talking about the West Coast? It is an awful problem to have a reality like that and have witnesses not say something about it.

Mr. Fricano. Does Mr. DeLone dissociate himself from that objection?

Mr. DeLone. What?

Mr. Fricano. The objection made by Mr. Mellott and Mr. McSweeney.

Mr. DeLone. No. I have objected to the whole subject from the beginning. I do not dissociate myself from the objection. I recognize it is a troublesome [6159] matter, however. It is hard to deal with.

The Court. But it appears to me that there have been references to the litigation.

Mr. DeLone. Oh, yes.

The Court. There have been references to the results of the litigation, and——

Mr. DeLone. Not to the results.

Mr. McSweeney. Not to my knowledge.

The Court. Yes, that as a result—I don't mean the results. I mean—not the outcome of them. I mean there have been ref-

The COURT. 1860.

Mr. FRICANO. If Your Honor please, I think on GX 1860, if I may, the document is in evidence, but I think that those words the Court precluded me from reading to the jury, and I did not read to the jury.

The COURT. All right. Then I was incorrect on that.

Mr. FRICANO. I don't think our memo is clear on that, Judge.

The COURT. No. I am taking it from your memo.

Mr. FRICANO. The memorandum is not clear. I apologize to the Court for that.

The COURT. Well, I think that it is essentially fair to allow references to be made to that litigation without going into detail of it, and that's the way I am going to rule, and you have your objection.

Mr. MELLOTT. Well, in any event, I do not believe there is any document in evidence, Your Honor, that I have not objected to that does specifically refer to the West Coast litigation.

[6162] Mr. FRICANO. There is one document in evidence that does refer to legal problems or the cases involving price discrimination, the Robinson-Patman Act, that was put in by Mr. DeLone without objection, which gave rise to this whole issue.

The COURT. Well, gentlemen, we would create an improper implication if we allowed the jury to consider that that West Coast litigation referred only to Robinson-Patman violations.

It doesn't, and I think that the way I have ruled is fair, and that's the way I am going to—I am going to continue that unless you wish to argue that matter at length. If you do, I will give you time in which to argue at length.

Mr. DELONE. It isn't my purpose to argue, but merely to clear—the fact is in my memorandum that I submitted this morning it is pointed out—the reference in that one document Mr. Fricano just referred to does not necessarily deal with West Coast versus some other Robinson-Patman litigation we were involved in. It is completely ambiguous.

The COURT. Yes. Well, the West Coast isn't Robinson-Patman litigation solely.

Mr. DELONE. That's correct, sir. I agree.

• • • • •

erences to what occurred as a result of that litigation, is what I am talking about.

Mr. DELONE. Oh, yes.

The COURT. Not the outcome of the case, but there have been for example, that Mr. Colon Brown was notified of it. That kind of thing is what I mean.

Mr. DELONE. Yes, that's correct.

The COURT. And that has been done here with various witnesses and various documents introduced, not by the prosecution, and I am going to allow that practice, which you apparently liked at that time and which you didn't make any objection, Mr. Mellott, to be continued through the trial.

You didn't object to it when it was done.

Mr. MELLOTT. Well, if the Court please, [6160] an answer was volunteered to a question.

The COURT. There was no motion.

Mr. MELLOTT. I do not believe that I waive any right to object because I do not get up and move to strike an answer.

The COURT. Well, okay, that's your feeling, but there were documents offered in evidence by defendants which referred to these things.

Now, I am just following that practice for the rest of the trial. You have your objection of record now, and if it becomes relevant, you can argue it to some more learned tribunal than myself, but that's my ruling.

Mr. MELLIOTT. If Your Honor please, I do not know of any document that's been offered in evidence that identifies the West Coast litigation as a matter being discussed that I have not objected to.

The COURT. It refers to significant litigation due to the West Coast suits.

Now, I don't know what that means if it doesn't mean West Coast litigation.

Mr. MELLOTT. Which document are you talking about, which exhibit are you referring to, Your Honor?

The COURT. GX 1860.

Mr. MALLIN. GX?

The COURT. That is in evidence. There [6161] was no objection on that basis then.

Mr. MELLOTT. We had a continuing objection to the Government's exhibits on that basis, Your Honor.

[6187] • • •

Q. Now on the same subject, on cross-examination you were shown Government Exhibit 988.

Mr. FRICANO. May he have that, please, Mr. Grainer, 988.

By Mr. FRICANO:

Q. And while he is getting that, I can describe the document for you. That is the document that says, "From the desk of K. H. Atwell. Bob Barber, Credit, would you please verify that?" Do you recall that, sir?

A. Yes, sir.

Q. If you will look on the bottom of the page, you see some little handwritten notes, do you not?

A. Yes, I do.

Q. Are they clear? Do you understand them?

A. Yes, I understand them.

Q. Why wouldn't you keep the same kind of notes concerning your contacts with competitors? Why didn't you?

A. Why didn't I?

Q. Why didn't you?

A. I wasn't—when I made a price verification call, all I wanted to know is the fact and I made a decision. [6188] I wasn't trying to build up a defense. I had no reason. For the same reason I would not make notes when I called back to the district managers and regional managers and asked them. I just didn't think of making notes. There was no reason other than that.

[6189] By Mr. FRICANO:

Q. Mr. Atwell, are these the kind of notes, on one, two and three, on the front of this page, showing discussions with United States Gypsum, Celotex and the reasons why your credit man wouldn't call Georgia-Pacific and Bestwall, are these the kinds of notes that you didn't want your people to write down on pieces of paper?

A. These are not the notes I was thinking of at all, no, sir.

Q. These aren't at all cryptic, are they; they're very clear?

A. These are clear notes, yes.

• • • • •

Q. Now, is it fair to say that every single aspect of the field report on a deviation, on an alleged deviation, from competition was documented?

Let me help you on that.

A. Yes.

Q. You had a special form for it, didn't you?

A. Yes.

Q. And all the information that the salesmen or the regional people could find out concerning the alleged deviation was marked down on that form, wasn't it?

A. Well, it was supposed to be on that form, yeah.

Q. And except, of course, your contacts with competitors? [6190] A. No, not necessarily. If I were going to verify a price, it could well have been something that came to me on that form, but it could have come to me in a letter, it could have come to me in other manners.

Q. Why did you keep so much paper around on these alleged deviations? Why did you document them so much?

A. Because I wanted to make sure that when—that I wasn't doing anything in violation of the law, and I wanted to keep these in file to prove that I wasn't.

Q. For your defense, correct?

A. Well, if it ever came for a defense, yeah.

Q. Just one moment ago you stated you wouldn't keep notes for a defense, didn't you?

A. I said I wouldn't keep notes for defense, that's right.

Q. Mr. Atwell, how are you going to have it, one way or the other? Can you reconcile that?

A. Yes.

Q. How do you reconcile that?

A. I can tell you that when I had those documents, if I had approved them, they had my signature on, that was the document, no matter how I got the information. When I call a dealer, I mean—I am sorry—when I called our district manager, our division manager, or whether I verified, when I finished that, I would sign it if I [6191] approved it, and that was all there was to it.

• • • • •

[6201] Q. Did these sales to these competitors of yours when they were on strike enable their customers to continue to be sold, notwithstanding the fact that they were not producing wallboard at their plants?

A. That was the purpose of selling the board, yes.

Q. Well, did this have anything to do with whether or not the strike would continue, whether it would be successful or not?

A. Oh, I don't know. I don't know anything about that, sir.

Q. You don't know anything about strike-breaking, Mr. Atwell?

Mr. DeLone. Objected to. It is immaterial, beyond any issue in this case.

Mr. Fricano. On cross-examination—on cross-examination, in four instances, Mr. DeLone was at pains to point out that National Gypsum Company sold wallboard to its competitors at times of strikes.

Mr. DeLone. I agree.

Mr. Fricano. He just said he agreed.

Mr. DeLone. But I ask that the question that Mr. Fricano has now asked the witness be read to the Court. And I do not see that the purpose for this examination.

Mr. Fricano. And the prior question and answer which led to it please.

[6202] [Last two questions and answer read.]

The Court. I am going to sustain the objection.

• • • • •

[6204] Q. Mr. Atwell, you testified on cross-examination as to the reasons why you verified. Do you recall that? You gave some instances.

A. I know why I verified, yes.

Q. Was one of the reasons that you verified—as you have used the term—so that you wouldn't meet yourself in competition?

[6205] A. I think I said that over the years. I don't think I said it here, but I think I have said it, yes.

Q. That is one of the reasons; is it not?

A. That could be one of the reasons, yes.

Q. In other words, if you put in a lower price someplace and that price was unnecessary, that price would spread—perhaps would spread throughout the marketplace, and the next thing you'd know you would be meeting your own competition; would you not?

A. Well, that would be true if I did that, but I don't think that's what I was talking about.

Q. Did you not testify at page 6530 of your Grand Jury testimony on March 2, 1973 before the Grand Jury—and this I will mark Government Exhibit No. 5014.

Did you not testify as follows to the following questions?

I am going to leave out three words, Your Honor, pursuant to the Court's ruling.

Mr. DeLone. I would ask you to.

Mr. Fricano. I am going to leave out three words.

Mr. DeLone. I have no objection to the omission. I think it is consistent with the Court's ruling.

> Question. During the course of [6206] your blank blank blank and blank you said that you answered verification calls "so that we don't find ourselves meeting something in the field which was an unfounded report, and when we turn around, and someone who would be meeting that, and we would meet that particular report, the first thing you know I would be meeting myself, and that is why I answered them."
>
> Is that still true today, your testimony?
>
> Answer. In a sense; yes, sir.
>
> Question. And it may not be artfully phrased——
>
> Answer. It sure isn't.
>
> Question. ——but those are your exact words.
>
> Answer. Well, I am not proud of those exact words.
>
> Question. The fact of the matter is, if you did not deviate from your published price on an unfounded report, you would then ultimately meet yourself in that fictitious price? You would be competing against yourself?
>
> Answer. This could happen; yes, sir.
>
> Question. Well, isn't that the [6207] thrust of what you are trying to say here?
>
> Answer. I think that may be it, yes.
>
> Question. That may be it. Was it?
>
> Answer. Yes, I would be meeting myself if I had a report and it was unfounded and I met it. If it wasn't true, I could be meeting my own competition, yes.
>
> Question. Sure. And the next thing you know, you have a deteriorated price situation in a region.
>
> Answer. Yes, that could happen.

Question. Did price checking help to prevent that type of thing?

Answer. I think it did, yes.

By Mr. FRICANO.

Q. Well, I can't go into the next one because that's not fair comment. I will ask you the question.

Now, when you verified, were you able to ascertain in at least 50% of the occasions that you did so that the list price was the correct price?

A. Yes, sir.

• • • • •

RE-CROSS EXAMINATION

[6211] • • •

When you met on October 25, 1968, was the occasion of that meeting the fact that, at that time, authority was being extended, newly extended to regional managers to meet competition within certain guidelines when they encountered such competition in the field?

A. It was apparently one of the subjects of the meeting, as shown in the document.

• • • • •

Q. As a matter of fact, don't National Gypsum Exhibits 28 and 29 indicate a price cut initiated around the [6212] country to all customers by National Gypsum?

• • • • •

The WITNESS. The answer to that question is yes.

• • • • •

[6225] EARL KROTH called as a witness and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. SCHMOLL:

Q. Would you state your name and residence address for the record, please?

A. Earl Kroth, K-r-o-t-h, 79 Red Oak Drive, Williamsville, New York, 14221.

Q. Are you appearing here voluntarily?

A. Yes, I am. Well, I am under subpoena to appear. I don't know if that makes it voluntary or not.

The COURT. Well, not very.

By Mr. SCHMOLL:

[6226] Q. Have you been employed by National Gypsum Company at any time in the past?

A. Yes, I have.

Q. When did you begin your employment with National Gypsum Company?

A. In 1951.

Q. Were you still employed with National Gypsum Company in 1960?

A. Yes, I was.

Q. Could you trace your employment history with the National Gypsum Company from 1960 on?

A. Well, I worked from 1960 through April 15, I think, of 1970.

In 1960 I was manager of Sales Service.

Sometime in about 1961, I was transferred to Assistant of what was then, I think, Price and Policy Department, and later was then known as Sales Administration Department.

Sometime in the late 60's, '67, '68, maybe even '69, I am not sure what it was, I was made Manager of Sales Administration Department, and that was the position I held when I resigned in mid-April of '70.

Q. All right.

What were your duties and responsibilities in the position, in the Sales Administration Department, from about [6227] 1961 until the time that you became Manager of Sales Administration Department?

A. Before I answer that, let us clarify something, because if I use the words interchangeably,—so that you will know what I mean.

During the period the department was known as either Price—Price and Policy or Sales Administration, and this name changed once or twice during that period in the '60's, into the 70's, so if I use one or the other, it is actually the same basic department with the same basic responsibilities.

When I went into the department as Assistant Manager, I had responsibility for certain products, none of which included gypsum.

At sometime in either late '60 or maybe even into '62, the other assistant manager in the department was given another assignment, and I was then assistant on all products in dealer sales for National Gypsum Company, which then included gypsum products.

I held that position until I was made Department Manager, which I said is sometime in the later 60's, '67 or '68, whatever it was.

Q. Did your duties and responsibilities change when you became department manager?

A. Basically, no. I took on a few additional [6228] responsibilities which had to do with the—I think I got more involved in intraindustry sales. Basically it remained the same. There wasn't any major change in the responsibility.

Q. Did you continue to have responsibilities with respect to gypsum products after you made the change to manager?

A. Yes, I did.

Q. Now, focusing entirely upon your responsibilities with respect to gypsum products, what did you do from the time you had any responsibilities for gypsum products, beginning sometime in 1962, as you have testified, and onward?

What did you do with respect to gypsum products at National Gypsum Company?

A. Well, myself and the people who worked for me in the gypsum end of that department had the responsibility for publishing and determining, developing, publishing prices for those particular products, and to place the application of those products, of the prices and policies on those products.

Q. How would you go about placing the application of those prices and policies?

A. Well, the prices that were published, that were determined to be the prices that were to be in effect that would apply in a sale were given to the plant personnel and other people who actually handled the paperwork after the [6229] shipment had been made and would price the shipment and send the invoice to the customer, and we made sure that the people had the

prices to put on the shipments to make sure that the customer was priced properly.

Q. Did you make sure that the sales force was soliciting business at the published price?

A. The standing rule or procedure was that the salesmen were to solicit business at the published prices, which were given to the salesmen, and were also announced to the trade in the form of price bulletins, and the standing procedures was that any business that they solicited was to be at the price that was published for that particular destination and for that size load.

Q. Did you ever have any deviations from your published prices?

A. Yes, we did.

Q. Did you have any authority to authorize deviations from your published prices or policies?

A. Yes, I did.

Q. Under what circumstances would you authorize a deviation from your published prices or policies?

A. When it was determined that a competitor had lowered a price to a customer, then we had the option of meeting this and frequently did.

We authorized the shipment to be priced at the [6230] same price that the competitor was using.

Q. Did you personally have this authority to authorize a deviation from a published price?

A. During most of the period I did have that authority, yes.

Q. Now, you say "most of the period."

Were there some periods when you did not have such authority?

A. Yes, there was.

Q. What periods were those or what period of time was that?

A. In late December of 1965, and for quite a few months thereafter, I don't recall how long it was, a year, year and a half, I had no authority to deviate from the published price.

Q. Who had such authority at that point in time?

A. Nobody had authority to make any deviations.

[6231] By Mr. SCHMOLL:

Q. Well, did Colon Brown, the Chairman of the Board?

A. Well, if he was the one that made the policy—and I don't know this—then I would assume he had the authority to make that decision.

Mr. DeLone. I move to strike the answer, the portions which are assumptions. The witness says "I don't know this, I would assume." I move to strike.

The Court. Well, there is certainly no harm to his answer either. He didn't say yes and he didn't say no, so I will not strike it.

By Mr. Schmoll.

Q. Where was Mr. Atwell in relation to you in United States Gypsum Company during the period you were employed there? Was he a superior to you?

A. Yes, I worked for him.

The Court. I want to clarify. The reason I sustained the objection is the witness said in effect, "I don't know."

Mr. DeLone. As long as it is so understood. I had a little problem with it. Sometimes assumptions are taken to be more, sir.

The Court. All right.

Go ahead, Mr. Schmoll.

Mr. Schmoll. May I have the witness' [6232] last answer, please.

[Last answer read.]

By Mr. Schmoll.

Q. Did you come into frequent contact with Mr. Atwell?

A. Yes, I did.

Q. Did you report to him directly?

A. Basically, yes, I did.

Q. Is this throughout the period of time from 1962 when you first began to have responsibilities with gypsum products, until the time you left the corporation?

A. Yes. During that complete period I did work directly for Mr. Atwell.

Q. Where was Mr. Atwell's office in relation to your desk or office?

A. Well, his primary location in the building didn't change too much during that period, as I recall. But I moved around to various spots. At some times I was within 25 feet of his office. At other times I was probably two or three hundred feet away.

Now the last—after I was made Manager of Sales Administration—I had an office apart from the general big office where we all sat most of the time, in that I was behind three walls, separate partitions, and that was on the other side of the office from Mr. Atwell.

Q. During the period 1962, beginning in 1962 and [6233] on until you left the company, did you at any time contact competitors directly concerning the prices or other sales policies on gypsum products?

A. Yes, I did.

Q. On what occasions would you—I withdraw that.

What would occasion you to contact the competitor directly concerning these matters?

A. When we received reports of competition reducing prices to certain customers, or in certain markets, and we could not obtain any evidence from the field in the form of a published price list or an invoice showing much lower price, and when the dealers refused to give us orders, give us business, I then sometime called to see if the competitor was actually doing this, whether they had a lower price to a certain customer or in a certain market.

Q. Did you receive answers to your questions?

A. Generally, yes.

Q. Did competitors call you on these matters?

A. Yes, they did.

Q. How did you know whom to call in your competitor companies?

A. When I initially started to make these calls, it was normally in the absence of Mr. Atwell or Mr. Brown, who were out of the office and who normally would answer this type of information for me when I had this kind of a [6234] problem. And they at times would say, "Would you call Mr. so and so at that particular competitor's office and ask him whether they have this low price at XYZ Lumber?" or whatever it might be. And I would do this.

Q. You say Mr. Atwell or Mr. John Brown would normally get this information for you?

A. Normally, if they were in the office, I would take this to them and they would give me an answer as to whether or not we would meet this competition.

Q. They were in contact—Excuse me, did you want to add something?

A. I was just going to say that in some cases while I was in their presence they would contact a competitor and check to see if that price was actually in existence.

Q. And they gave you the names of the people to call in the competitor companies?

A. Gradually, as they were out of the office, or too busy or something, and they wanted me to check a specific situation, yes, they would give me the name of the person and request that I make the call.

Q. Did any other officials at National Gypsum Company, your superiors, make requests of you to contact competitors regarding specific competitive situations?

A. Yes. Well, starting back in the early days, I recall a few cases where Mr. Wade Hildinger had requested [6235] me to do so. He was at that time, I believe, a Vice-President of Sales.

At later times, subsequent vice-president of sales, namely Mr. Cerruti and Mr. Nicely, made such requests that I call the competitor and check the price.

Q. Mr. J. P. Hayes did he ever make any requests?

A. Yes, he did. Not very often. I think it only happened a couple of times at the most, but he did make such a request.

Q. When Mr. Nicely, the defendant, asked you to contact a competitor to check out a competitive situation, did he give you the name of a competitor to call?

A. I believe he did on one or two occasions, but I am not sure that I could say that with any real certainty.

Q. You are sure that he did make such requests of you.

A. Yes, I am sure.

The COURT. Well, I don't understand that. How could he make the request without telling you what company to call?

The WITNESS. Well, if I had—Judge, if I had a report that a certain competitor had a lower price——

The COURT. Oh, you knew?

The WITNESS. I knew the competitor that had to be called. And I frequently, because of past experience [6236] from other requests, would know who to call.

The COURT. You are talking about the individual?

The WITNESS. Yes, sir.

The COURT. I see.

All right.

By Mr. SCHMOLL:

Q. Did you contact anyone at United States Gypsum Company concerning these requests?

A. Yes, I did.

Q. Whom at United States Gypsum Company did you contact?

A. At various times,—let's see. I talked to a Mr. Bud Weiser. A Bob Evans. There was an O'Brien that I talked to. There may have been somebody else, but I don't recall the name offhand.

Q. Did you contact anyone at Celotex Corporation?

A. Yes, I did.

Q. Whom did you contact at Celotex?

A. Mr. Don Miller. And later on he had an assistant.

Q. Mr. Warren Hill?

A. Yes, I did talk to Mr. Hill.

Q. Mr. Jerry Fisch?

A. No, I never talked to him that I recall.

Q. Did you contact anyone at Georgia-Pacific Corporation?

[6237] A. I talked to people at Bestwall. And later on there was a merger there of some sort. I think primarily I talked to Mr. Bob Sikes. I can't recall anybody else that I might have talked to.

Did you contact anyone at Flintkote?

A. Yes, I did. Mr. Wagner and Mr. Malhiot.

Q. Mr. Anderson?

A. No.

Q. Did you contact anyone at Fibreboard?

A. Not to my knowledge. I don't recall any such contact.

Q. Anyone at Johns-Manville?

A. If I did, I don't recall. I don't recall the name, or I don't really recall specifically doing it, no.

Q. When you made these contacts with competitors, did you get answers to your questions?

A. In most cases.

Q. What would you do with the information after you received it? Would you take it back to Mr. Atwell or Mr. John Brown, or Mr. Nicely, or whoever made the request that you check it out?

A. In some cases, yes. And in some cases, no. In some cases when I was requested to find out if the price existed, I was told that if that competitor does have that price in there, that I was authorized to meet that price [6238] for our own customer. And in that case then I wouldn't have to go back to my superior.

In other cases, yes, I had to carry the information back. And then we possibly talked about it to make a determination. "Is there any advantage to meeeting this price?" "Should we pass up the order?" Or, "Do we meet the price and hopefully get an order?"

Q. What was your purpose in contacting the competitor if you weren't sure whether or not you were going to meet the price to begin with?

A. Well, it is pretty hard to run a business unless you know what is going on in the market. And even if you might not meet the price, maybe you can't afford to meet the lower price. It still—Maybe it is a matter of ego, but you sure would like to know what is going on in the market as far as price is concerned.

Q. Did you make any notes of these contacts with competitors?

A. No, I didn't.

Q. Do you know whether or not Mr. Colon Brown knew of these contacts by yourself and Mr. Atwell, and others in National Gypsum Company with competitors?

A. He knew that Mr. Atwell was calling competitors. I am not sure that he knew that I was making calls.

Q. How do you know—Excuse me.

[6239] A. I am not sure that they knew that anybody else was making calls.

Q. How do you know that he knew Mr. Atwell was making calls to competitors?

A. On a few occasions, at least a few occasions, I was present when Mr. Atwell advised Mr. Brown—Mr. Colon Brown that is,—that he had contacted a certain competitor and confirmed that a certain discount or a certain price was in at a certain dealer or in a certain market or what have you.

Q. This was in your presence?

A. Yes, it was.

Q. Was anyone else present on these occasions?

A. I believe in a few cases there may have been other people present, but I don't recall who they were.

[6240] Q. Do you know what time period these occasions took place in?

A. It was in the later sixties, but I can't be real specific as to when they—when they happened. I could pin it down to the point of somewhere in about late '66, early '67, possibly, when they were still not meeting competition, when they were still not lowering our price to be competitive in the market.

• • • • •

[6241] Q. Do you know whether or not, at any time, Mr. Colon Brown ever requested or instructed Mr. Atwell to keep him advised of the pricing situation on gypsum products?

A. Not in that specific sense; no.

Q. In what sense?

A. Well, in the sense, as you worded the question, he specifically advised Atwell that he was to keep him advised.

Q. Well, do you know, generally?

A. Generally, I know that Mr. Atwell did keep him advised when we were not being competitive, because National Gypsum was constantly losing more and more business, and he was quite concerned, as we all were.

Q. Now, what subjects would you contact——

The COURT. How about after you again became—began to meet the competitive prices, were—did Mr. Brown make any such inquiries?

[6242] The WITNESS. On a few occasions, I am—I feel that he did. I can't remember any specific cases, Judge.

The COURT. After you began asking prices again?

The WITNESSS. Yes. He, from time to time, wanted to know how things were going. "Is our volume staying up there? How much has the price depressed in the last few weeks or month," or what have you, in order to keep abreast of—

The COURT. But did he ever talk about verifying prices after you became competitive?

The WITNESS. I don't recall any such conversation.

The COURT. All right.

By Mr. SCHMOLL:

Q. Now, what subjects did you contact your competitors regarding? Prices?

A. Yes, prices.
Q. Service practices?
A. Yes.
Q. What types of conduct would be involved in service practices, as you use the term?
A. The published prices were—let me start my answer over, please.

[6243] In most markets, a customer had the option of taking delivery via different means of delivery. For instance, a 10-ton truck, a 20-ton truckload, a 20-ton carload, a 40-ton carload, a flatcar, etc., various methods; and, in some cases, the price could be the same, regardless of the type of delivery, and other markets, it could be different for the different types of delivery. And I—sometimes—I sometimes checked to see, because it would appear a competitor was making a delivery of a small load at the lower, large load price, and this would be a report of—by the dealer, and I would sometimes check something of that nature.

Q. How about truck delivery as opposed to rail delivery?
A. Yes. Well, this falls into what I just explained. In some cases, it was just—we had one size truck into a market, and that truckload price generally was higher than the rail price, because the rail rates are lower and it didn't cost as much to deliver by railroad.
Q. Well, by special product sizes——
A. When you say "special," this means non-standard, in my mind, and that means you have to alter your production line and incur additional costs. These—this type of an order or this type of product was normally sold at a higher price, a markup, to cover the additional cost. In some [6244] cases, we had reports of such types of material being delivered at the standard price with no markup.
Q. And you would contact the competitor to determine if that was was accurate?
A. I would contact the competitor if I felt that this was a valid report and required additional checking to see whether we would meet it or not.
Q. How about special packaging practices?
A. As I understand it, primarily, our discussion here concerns gypsum board.
Q. That is correct.

A. Gypsum board, basically, was not considered to be packaged. It was put into units of certain sizes. Some of them were banded, some of them were not banded, but there were so-called standard sized units, depending on the type of equipment it was loaded on, and the size of the board, and so forth. There were sized units that could be handled effectively by standard mechanized unloading equipment.

In some cases, we received reports that a competitor might be shipping smaller units, which, to put this on a load, would incur additional cost to provide that type of service and, economically, there was less profit on that type of load.

Q. Extra dunnage?

[6245] A. Extra dunnage, yes—not very frequently, but sometimes, we would check that.
Q. Would you explain what that practice is?
A. Well, dunnage is pack-out material. Generally, it was defective material of the drywall—defective wallboard, and this was used to protect the load in transit, between stacks or at the ends of the car or truck or what have you. If—depending on the type of work a contractor or dealer had in his area, the dunnage could, sometimes, be used, if it wasn't too beat up when it arrived, and this, in effect, was a gift to the customer, if it were being done. He could make money on this free material.

The standard procedure, depending on the loading facilities, the type of shipment, and so forth, that was made, would call for enough dunnage to protect the load, but not excessive dunnage, and, if we had a report of—if a customer insisted on excessive dunnage because a competitor was doing it, I feel that, on occasion, I checked that to determine whether it was being done by a competitor.

Q. I see. How about palletizing of wallboard?
A. Yes, I would—I would have occasion to check that.
Q. Was that practice restricted to certain areas of the country?

[6246] A. Generally, yes. It was only prevalent in a few of the metropolitan markets.

[6247] By Mr. Schmoll:

Q. Did you check with competitors regarding the boundaries of price zones; that is whether a particular county or a particular city was in one zone as opposed to another?

A. In a sense, yes. If we found that a competitor was offering a price to a dealer in a city that was lower than the price we were offering and that city was adjacent to a price zone, a different price zone, and that price was being offered was the same as the adjacent price zone, that would cause us to say and believe that possibly this area is included in the other price zone by this competitor and he is using that lower price zone in that area. I would on occasion check that.

• • • • •

Q. Did you contact competitors with respect to [6248] any accounts located in the western part of Pennsylvania?

A. Yes, this would have been a normal part of National operations.

Q. Can you recall any specific account in the western part of Pennsylvania that you had a contact with competitors regarding?

A. The only account that I can recall by name is a dealer by the name of Parade Lumber in Erie and I guess that is because there is a Parade Lumber up in western New York area and it sort of ties in in my mind. I am sure there are other dealers right in the Pittsburgh metropolitan area here that would have been involved, but I can't think of their names offhand.

Q. Did you contact competitors to obtain directly from the competitor their price sheets at any time?

A. I don't believe I ever did that, no.

Q. Do you know whether or not Mr. Atwell did that?

A. I believe I was present on one occasion where he had requested sheets to cover a certain area that we had no information on in our office.

Q. Do you know whether or not those sheets came from the competitors, directly from a competitor?

A. I believe they did, because shortly thereafter I was given the information in the form of price sheets or a price announcement or something.

[6249] Q. Did you ever see any envelopes in which the price sheets had been sent from the competitor's office to National Gypsum Company?

A. I don't recall ever seeing envelopes, no.

Q. I show you a document marked Government Exhibit 5015, 5015, and direct your attention to page 3018, lines 6 through 23, and ask you to read that and if that refreshes your recollection regarding the matters that I have just asked you about.

A. This is my testimony that I gave at the Grand Jury.

Q. Does it refresh your recollection?

A. I don't contest that I said this, but at this point I really can't recall that I saw envelopes. I may have, but I don't recall it.

Q. Did Mr. Atwell send competitors National Gypsum Company's price sheets, to your knowledge?

A. I recall a few cases where such requests were made and sheets were sent.

Q. In the case that you mentioned, where Mr. Atwell received price sheets from a competitor, do you know which competitor sent the price sheet?

A. I can't recall, no.

Q. I again show you Government Exhibit 5015 and direct your attention to page 3027 and ask you if that [6250] refreshes your recollection as to which competitor sent the price sheet to Mr. Atwell.

A. I think I can say with a fair amount of certainty that I do recall that the sheets from United States Gypsum Company were—I do recall the occasion where some were received. I can't say that I can recall the occasion of Flintkote, which is stated here.

Q. Do you know what time this occurred?

A. No.

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CROSS EXAMINATION

[6271] • • •

By Mr. DeLone:

Q. Well, so far as gypsum products are concerned, if you know, was there a decline in your involvement in vertification calls as the—in your vertification calls about gypsum products, during this period you have described, when you became more involved in other products and more people were taken on to handle gypsum?

A. I would say yes. As I had already mentioned yesterday, in '66 and probably into '67, I don't know that I made any calls. If I did, they were very, very few, and then, as we again had authority to meet the competitive prices on gypsum, I

did get back into it somewhat, but not as extensively. It was only on occasion that I made a call.

Q. Now, when you said in '66 and '67, you don't know that you made any calls, you are talking about any calls with reference to gypsum products; are you?

[6272] A. Yes, sir.

• • • • •

[6273]

Q. And, when you say it was the policy to verify, did you verify as to any products, gypsum and others—did you always verify, every time there was a request to meet competition, or was this infrequent?

A. Oh, absolutely not. It was only on those occasions where we felt that we didn't have enough real information to make a decision based on what we had, was—the information was so vague that we didn't feel confident to make a good judgment and make a good decision.

Q. Because you weren't certain about the reliability of the information that you had; is that correct?

A. That is correct.

Q. And did you ever initiate—with reference to gypsum wallboard, did you ever initiate a call to verify a report you had received about prices from the field, initiate such a call after you had already decided not to meet the competitive price which had been reported up to you?

A. No. I don't know of any such case.

• • • • •

[6275] By Mr. DeLone:

Q. Now, did there come a time in early 1969 when you stopped making any verification calls?

A. Yes. In early '69. I believe it was approximately mid-January we were advised not to continue making any calls of verification.

Q. And did you ever make any such calls thereafter?

A. Not to my knowledge.

Q. There was reference yesterday during the course of your examination to an instance or two where you recalled that

National had received price sheets from a competitor. And I think also reference to an instance or two where it had transmitted price sheets to a competitor, although you weren't able to fix the dates when this happened.

Do you know, to your knowledge, did National ever receive price sheets from a competitor which had not already been distributed to the trade and made public?

A. No, I don't know of any such case.

Q. And to your knowledge did National ever transmit to a competitor its price sheets prior to the time those price sheets had been made public?

A. Not to my knowledge, no.

Q. And did you ever discuss with any employee of a competitor a proposed change in prices or terms and conditions of sale of gypsum wallboard?

[6276] A. No, sir.

Q. And are you aware of Mr. Atwell ever having had such a discussion?

A. No, sir.

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[6277] By Mr. Mellott:

Q. During the period from 1965 until April 1970, isn't it a fact that your toughest, most frequent competition, and one that gave you the most trouble, was Georgia-Pacific?

A. I don't think I could answer yes to that general a question, or to that specific a question for that general period.

Q. Well, isn't it a fact that in your testimony before the Grand Jury you were asked the following questions?

The Court. Mr. Mellott, "were you asked and did you say?"

By Mr. Mellott:

Q. Were you asked and did you say the following:

Question. Who was your toughest competition?

Mr. Mellott. This is page 3093.

The Court. You have to go back a little bit and give the time period there. Does it give the time period?

[6278] Mr. Melliott. Well, it does ultimately in the questions, Your Honor.

The Court. All right, go ahead.

Mr. MELLOTT. It will be in the series.

Question: Who was your toughest competition?
Answer: You mean most frequent?
Question: Yes. Who was the one that gave you the most trouble?
Answer: Probably Georgia-Pacific.
Question: In what years?
Answer: Probably through about all the entire 1960's.
Question: That would be on a national basis; would it not?
Answer: Yes.

By Mr. MELLOTT:

Q. Were you asked those questions and did you so testify?

Mr. SCHMOLL. Your Honor, could Mr. Mellott continue reading the next question and answer, please.

Mr. MELLOTT. Yes.

Did you have more difficulty on a regional basis with single plant [6279] producers than you did with the national producers?
Answer: In some regions this probably was true, yes.

By Mr. MELLOTT:

Q. Were you asked those questions and did you so testify?
A. Yes.

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[6280] RE-DIRECT EXAMINATION

By Mr. SCHMOLL:

Q. Mr. Kroth, you say you stopped making these contacts with competitors in mid-January of 1969. Why did you stop?

A. The company's legal counsel advised us, advised the management of the company that there had been some court decision—which I have heard referred to as the Container Case—where the judge had ruled that it either was illegal, or there was some question concerning the legality of price verification. And, until further clarification, we were told to cease and desist.

Q. Who told you this?

A. I was either told by Mr. Atwell directly or in conjunction with one of the attorneys.

Q. Do you know whether or not anyone else at National Gypsum was told that they should stop?

A. To my knowledge, all of the people in our own department who in any way would be involved with this type of procedure were informed.

Q. Do you know whether or not those instructions were followed?

A. To the best of my knowledge they were, except in one case that I know of where apparently the party became confused.

Q. What case was that?

[6281] A. The case of Mr. Webster.

Q. Did Mr. Webster make calls after these instructions were issued, receive calls?

A. I understand by his own admission that he did. During a certain period somewhat later in '69.

[6282] By Mr. SCHMOLL:

Q. Did Mr. Atwell make and receive calls after these instructions were issued?

A. Not to my knowledge.

Q. Did Atwell know that Mr. Webster was making and receiving calls from and to competitors?

A. I don't believe so.

Q. Did he become aware that Mr. Webster was making calls or receiving calls in 1969?

A. I believe it was late '69 when he did become—become aware of it, and it happened to come out in a conversation between him and Mr. Webster, and he became quite upset and immediately wrote a letter to both Mr. Webster and myself, because we were the immediate people working for him, and, again, reiterated that this was a no-no.

Q. You say that instructions were issued in mid '69 to stop the practice of contacting competitors?

A. No.

Mr. DELONE. Did you say mid '69?

By Mr. SCHMOLL:

Q. January, 1969?

A. Somewhere in January. It was the first or second week, as I recall. I don't recall the exact time, but it was in January of '69. I believe it to be approximately the middle of the month.

• • • • •

[6283]

Q. Did the frequency of calls to competition depend upon the amount of competitive activity in the market?

A. I would say yes, generally, this would be true.

• • • • •

[6287]

O. MAX MONTGOMERY

DIRECT EXAMINATION

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By Mr. FRICANO:

Q. Mr. Montgomery, by whom are you employed?

A. Republic Housing Corporation.

Q. Formerly known as Republic Gypsum Company?

A. Yes, sir.

Q. The single plant producer located in the Southwest?

A. Yes, sir.

Q. When did you first become employed by Republic Gypsum?

A. In 1964.

Q. Would you please tell us what job you held then and other jobs which you held up through the present?

A. I started with Republic as territory salesman and moved up into assistant sales manager.

The COURT. Can you speak into the microphone?

The WITNESS. Yes.

Moved up to sales manager, later was promoted to vice president of sales and now serve as executive vice president of the company.

[6288] By Mr. FRICANO:

Q. While you were employed—of course I realize you still are—but during your employment history at Republic Gypsum, did you from time to time contact your competitors on prices and other matters and they contact you?

A. Yes, that is correct.

Q. Could you tell us the time period within which you made such contacts and such contacts were made of you?

A. From a period probably 1968, early '69, possibly as early as '67 through up to mid-1971.

Q. Mid-1971?

A. Yes, sir.

Q. All right.

Now who at National Gypsum did you have contact with up through mid-1971?

A. Ken Atwell and I can't say positive on Dan Webster but I had contact with Dan Webster.

Q. Did you have any such contacts with Celotex up through mid-1971?

A. Yes, I did.

[6289] Q. Who?

A. Don Miller.

Q. Anyone else?

A. Possibly Jerry Fisch. However, I don't know how late on Jerry Fisch.

Q. Did you have any contacts at Flintkote during this time period?

A. Yes. However, they probably ended before the contacts with National and Celotex ended.

Q. Who?

A. I talked to Warren Malhiot and also Mr. Anderson.

Q. Did you have any contacts at Georgia-Pacific in this time period?

A. Only during a very short period of time and I had contact with Mr. Gene Burch on possibly two, three, four occasions.

Q. In what year, do you recall?

A. No, I do not. Probably early—probably in '70, I would guess.

• • • • •

[6290] Q. All right. I am sorry.

Anyone at Johns-Manville?

A. Yes, Mr. Kent Comann.

Q. And Texas Gypsum Company, now known as Temple Industries?

A. Ted Armstrong.

Q. Is that senior or junior?

A. Junior.

Q. What types——

Anyone at United States Gypsum?

A. No.

Q. What types of competitive information did you exchange during these—were these telephone calls, by the way?

A. Yes.

Q. What type of competitive information did you exchange?

A. Pricing, questions concerning terms or job protection and possibly questions concerning trucking.

[6291] Q. Did you ever, from time to time, have occasion to ascertain from Mr. Atwell, now of National Gypsum, the prices for an entire marketing area?

A. Yes.

Q. Did he ever ascertain this from you?

A. In general terms, yes.

Q. How about with Mr. Miller?

The COURT. Wait a minute. I don't understand what that means.

You mean instead of the price to a particular dealer, how much you were charging in East Texas?

The WITNESS. Yes, sir, right.

The COURT. Go ahead.

By Mr. FRICANO:

Q. I am sorry. I have lost it here.

Mr. Miller, too?

A. Yes, sir.

Mr. MCSWEENEY. Objection to the form of the question. I don't know what he is asking about Mr. Miller. There is no foundation.

The COURT. He is going back to who he got—

Mr. FRICANO. The area prices from.

The WITNESS. Yes.

Mr. MCSWEENEY. I object to that. [6292] If he is asking about a conversation, he has to fix the time, date, place, who was present and what was said.

By Mr. FRICANO:

Q. During the period from 1968 when you first started checking up, through when you discontinued in mid-1971, did you from time to time in this period exchange area prices with Don Miller of Celotex?

A. Yes, I did.

Q. In your conversations with Mr. Atwell at National in the latter time period, did he ever tell you he was instructed not to make such telephone calls anymore?

Mr. DELONE. Objected to unless the time is specified.

The COURT. What is the date of that Container case?

Mr. FRICANO. January, 1969, Your Honor.

The COURT. When in January?

Mr. DELONE. I believe it is the 14th.

The COURT. Ask him that. That is what we are talking about.

By Mr. FRICANO:

Q. Subsequent to the January 14 United States Supreme Court decision in the Container case did Mr. [6293] Atwell ever advise you in his conversations with you that he had been instructed not to have such further conversations?

A. No.

The COURT. Now, ladies and gentlemen, don't speculate about what the Supreme Court said in the Container case. If any instruction as to the law is necessary on that subject, I will give it to you at the appropriate time.

• • • • •

[6303] CROSS-EXAMINATION

By Mr. DELONE:

Q. Now, will you look through the list of the telephone numbers you have listed in your 1970 pocket calendar and tell me if you had listed there the name of either Mr. Atwell, the number of either Mr. Atwell or Mr. Webster of National Gypsum?

A. No. I do not see it listed.

Q. Do you have the number of Mr. Don Miller of [6304] Celotex listed?

A. Yes, I do have.

Q. Now, you made reference in the course of your direct testimony to a conversation or some conversation with, or conversations, plural, I don't know which it was, with Mr. Atwell, in which inquiry was made, either by you or by him, and responses were given, about what was the price in a particular area, rather than a particular customer.

Do you recall that, testifying in that regard?

A. Yes.

Q. Was such inquiry, either by Mr. Atwell to you or by you to Mr. Atwell, with relation to prices which had already been quoted to customers, offered to customers in that area?

A. Yes.

Q. And did that provide you, when you asked Mr. Atwell about it, with a way of determining whether a number of reports about prices, competitive offers, in a given area, were accurate or not?

A. Yes.

[6305] By Mr. DeLone:

Q. In National Gypsum you had other contacts with National Gypsum besides just this contact back and forth with Mr. Atwell or Mr. Webster verifying competitive prices; did you not?

A. In what respect do you mean?

Q. Well, you purchased wallboard paper, for instance, from National Gypsum; did you not?

A. That's correct. That is correct, yes.

Q. Did you deal with both Mr. Webster and Mr. Atwell in reference to the purchase of wallboard paper from National?

A. No. Not Mr. Webster. Primarily Mr. Atwell in paper purchases. However, at the time most of the paper purchases were being handled by Mike Simpson rather than myself. Only within the last year-and-a-half have I been involved in paper purchases.

Q. Now, are you able to fix with any certainty when it was or what subject—specifically, what job or what competitive offer was discussed when you had any discussion with Mr. Atwell subsequent to January of 1969 about a competitive situation?

A. No, I can't give you a specific. No, sir.

Q. And you do recall that on some occasion or occasions you had such discussions with Dan Webster of [6306] National?

A. Yes.

Q. And is it your testimony, or do you recall whether discussions with Webster occurred after the middle of January 1969?

A. It is more difficult for me to fix a date on Dan than with Ken Atwell. I generally only talked with Dan Webster in the event that Ken Atwell was out or couldn't be reached.

Q. Well, you are not able to fix a date—are you—of any particular conversation with Mr. Atwell either?

A. I am sorry, I don't understand your question.

Q. You are not able to fix the date of any particular telephone conversation with Mr. Atwell either; are you?

A. Not a specific date, no, sir.

Q. The conversation which you have—or conversations which you referred to—with Mr. Atwell subsequent to January of 1969, were they telephone conversations?

A. Yes, sir.

Q. Was there more than one, if you know?

A. Yes. To the best of my recollection there would have been more than, more than one call.

Q. I didn't ask what there would have been. What was there, to your knowledge, Mr. Montgomery? What was there, to your knowledge, one or more than one?

[6307] A. To the best of my recollection, more than one call.

Q. But you don't know when or you don't know the subject matter other than as you generally described it?

A. That is correct.

Q. And that is the same general subject matter which you had discussed from time to time with Mr. Atwell by phone for several years prior to mid-January, 1969; is it not?

A. That is correct.

• • • • •

[6314] By Mr. Keck:

Q. You have been asked certain questions about verification, and I understood you to say, did you not, that you had not verified with anyone from United States Gypsum Company?

A. That is correct.

Q. At any time?

A. That is correct.

Q. Would you please describe simply for me the practice of verification as you practiced it, as you have testified here this morning? What prompted you to make a verification call?

The COURT. You mean—he said he didn't do it with United States Gypsum.

Mr. KECK. He didn't do it with my clients, but he said he did do it with some others.

The COURT. All right.

The WITNESS. Uncertainty as to the validity of the competition, for one thing.

By Mr. KECK:

Q. Did you have a way of determining the existence of lower competitive prices within your company?

A. Well, we would ask to see invoices of competitive [6315] companies to verify whether or not they were selling at below our prices or not. We have a field sales force that we depend on heavily to keep us advised as to what the competitive situation is in the market.

Q. And how do they keep you advised?

A. Through reports and telephone conversations; very few written reports.

Q. Well, then, do I understand that, occasionally, you would verify the existence of the lower competitive price by a contact with a competitor?

A. That is correct.

Q. How did you determine which ones to verify and which ones not to verify?

A. It was just a matter of judgment as to the feel we had for the particular account, whether or not we were being told the truth as to what the competitive situation was or not.

Q. The truth by whom?

A. By the dealer.

Q. The customer?

A. To our—that's right, the customer, to our salesman direct to me.

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[6319] By Mr. MELLOTT:

Q. Mr. Montgomery, my name is Cloyd Mellott. I represent Georgia-Pacific. Would you look at the two pages of 1668–A, Government Exhibit 1668–A and tell me, please, whether the names of any Georgia-Pacific employees appear on your list of telephone numbers.

A. No, they do not.

Q. All right, sir.

If I understand your direct testimony correctly, [6320] the only person at Georgia-Pacific that you had any verification calls with was Gene Burch.

A. Yes, sir.

Q. And I believe—excuse me.

A. Yes, sir, that is correct.

Q. And I believe you said you had two, three or four, is that correct?

A. That is correct.

Q. Isn't it a fact that each of those calls was originated by you?

A. That is correct.

Q. Mr. Burch never called you?

A. Not to my knowledge.

Q. Isn't it also a fact, Mr. Montgomery, that you ceased calling Mr. Burch because he didn't seem to know what to tell you or what the answers were to your questions?

A. That is exactly right, yes, sir.

Q. Now, Mr. Montgomery, have you been interviewed by Government counsel from time to time?

A. Yes, I have.

Q. How many times have you been interviewed by Government counsel?

A. Two or three.

Q. You were interviewed on August 25 and 26, 1971, were you not?

[6321] A. I can't specify the dates, no, sir.

Q. Do you remember that you were visited in Dallas, Texas and interviewed by Government counsel some time in 1971?

A. Yes.

Q. Do you remember you were also interviewed later that same year by Government counsel?

A. Yes.

Q. And have you been interviewed recently by Government counsel?

A. How do you mean?

Q. Within the last few months.

A. Not personally since the Grand Jury that I recall.

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Q. You referred to a conversation or conversations with Mr. Miller of Celotex.

A. Yes, sir.

Q. Where area prices were mentioned. Were those prices that were already in effect?

A. Yes, they were.

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[6337] CHARLES D. WEBSTER, called as a witness, having been first duly sworn, was examined and testified as follows:

Mr. KEENE. Give your name to the Court.

The WITNESS. Charles D. Webster.

DIRECT EXAMINATION

By Mr. SCHMOLL:

Q. Are you sometimes known as Dan Webster?

A. Most generally.

Q. Are you appearing here voluntarily?

A. Yes, I am.

Q. Were you subpoenaed?

A. Yes, I was.

Q. Have you been employed by National Gypsum Company at any time in the past?

A. Yes. I was hired by National Gypsum in 1958 and left their employ in 1970.

Q. What positions did you hold during the period from 1960 through—until the time you left the corporation?

A. My first position was service manager for gypsum products. I was then elevated to sales service manager for gypsum and other related products and, finally, promoted to [6338] Mr. Atwell's assistant.

Q. During the time that you were at National Gypsum Company, did you have any contact with Mr. Atwell?

A. Almost daily.

Q. He was your superior?

A. That is correct.

Q. What were your duties and responsibilities, if any, with respect to gypsum products in those positions?

A. Originally, our main function was a liaison between the field sales force and Buffalo management in regard to matters

of price and service problems. As this scope broadened, we were given authority to act upon information that had been generated from the field, reach a decision, and establish, to a degree, National's policy of sales.

Q. So the field sales organization which actually did the selling in the field came to your department, that is, the sales administration department, for its pricing and selling policies?

A. That is correct.

Q. Did you have any authority, at any time during this period of 1960 until the time you left the corporation, to authorize deviations from National Gypsum's published prices and policies?

A. Yes, I did.

[6339] Q. When and under what circumstances could you authorize deviations from published prices and policy?

A. Well, it depended a lot on the market condition at the time, and it depended a great deal on what had been generated by our field sales force to prove the existence of a lower competitive price. We analyzed this information that was generated by the sales force and reached a decision within the limits of our responsibility.

Q. Did you ever—I withdraw that. Was there any period of time, from 1960 until the time you left the corporation, when your authority to authorize deviations was withdrawn?

A. Yes, there was.

Q. What period of time was that?

A. This period of time was after December 15, 1965, until approximately late 1967.

Q. At any time while you were employed by National Gypsum Company did you communicate with the competitors regarding the prices of gypsum products?

A. Yes, I did.

Q. During what period of time?

A. The period of time, to the best of my recollection, would have been in late 1968, early 1969, and then again in late 1969.

Q. Did other individuals at National Gypsum Company [6340] have similar communications with competitors?

A. I know that Mr. Atwell did, and I am not relating to any specific time, now, but I know that he did communicate with competitors, and I know that Mr. Kroth did, and, several years ago, Mr. John Brown.

Q. What is the basis of your knowledge that Mr. Atwell and—Mr. Atwell and Mr. Kroth andMr. John Brown communicated?

A. I was in their presence when such calls were made.

Q. Did competitors call you to—regarding prices of gypsum products?

A. Yes, they did.

Q. Were these the same individuals that you called?

A. Basically, yes.

Q. What companies did you have the communications with?

Mr. DeLone. Objected to, unless the time is specified.

Mr. Schmoll. I believe, Your Honor, that the witness did specify the time he engaged in the communications with his competitors.

Mr. DeLone. Very well, if it is clear that that pertains to all of it is in that setting.

By Mr. Schmoll.

Q. Didn't—you had communicated with competitors?

A. I communicated with the Flintkote Company, the [6341] Celotex Company, Republic Gypsum, Grand Rapids Gypsum. At the moment, I can think of no others.

Q. Who did you communicate with—what individual did you communicate with at Celotex Corporation?

A. Mr. Don Miller and Jerry Fisch.

Q. What individuals did you communicate with at Flintkote?

A. Mr. Harold Wagner.

Q. Anyone else?

A. Not that I can recall.

Q. Mr. Anderson?

A. No, sir.

Q. Mr. Malhiot?

A. No, sir.

Q. What individuals did you communicate with at Republic Gypsum?

A. Mr. Max Montgomery.

Q. Grand Rapids?

A. Larry Murray, and then—I believe the fellows name was John Maddox.

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[6344] By Mr. Schmoll:

Q. Was he concerned with whether or not you had proper information on which to authorize a deviation from published prices?

A. Certainly, but you must realize the number of reports of competitive activity that were generated throughout these years was overwhelming and it was impossible to specifically sit down and discuss each and every one. We talked more in terms of general market conditions.

The Court. Who determined the policy as to what you should do before you changed the price?

The Witness. Mr. Atwell generally gave us guidelines on which to operate.

By Mr. Schmoll:

Q. Now, Mr. Webster, you have said that you do not believe that Mr. Atwell was aware that you made these calls.

A. Not until late 1969.

Q. Well, I ask you whether or not you testified as follows on a prior occasion in this courthouse on September 12, 1972, and I am reading from Government Exhibit 5017 at pages 3142 to 43.

Mr. DeLone. Give me one moment, please.

[6345] Mr. Schmoll. Lines 23 to 25 on 3142 through line 3 on 3143.

Mr. DeLone. I would ask you to start at line 14 on 3142.

Mr. Schmoll. Fine.

Question. Did Mr. Atwell ever ask you to call a specific individual at a competitor company?

Answer. No, he did not.

Question. Were you ever authorized or directed to make such calls?

Answer. No.

Question. Were such calls made by you within the knowledge of Mr. Atwell or any other superior of yours at National?

Answer. I do not believe specifically if they were aware of it, but Mr. Atwell and I talked about—frequently about the pricing situations, and it would be

my belief that he was aware at least during 1968, late 1968, that I made a few calls, or at least had accepted a few calls from a competitor.

Mr. DeLone. Would you continue with the next question and answer, please.

Mr. Schmoll. "Question. And did he [6346] acquiesce in your responding to these calls when they were made to you in his absence?

"Answer: Well, this I do not know, because I cannot specifically say he was aware that I was making these calls."

By Mr. Schmoll:

Q. Is that your testimony?

A. Yes, it is.

Q. Mr. Webster, how did it come about that you began making and receiving these calls?

A. I can't—I can't actually answer that, because I don't really know. When Mr. Atwell was frequently out of town, after I had become his assistant, calls, incoming calls, were transfered to me and I did answer these calls. Now, it it possible that because of incoming calls to me that I then became familiar with the people who were calling our department, competitors who were calling our department for pricing verifications and in this manner learned who to call and at what companies.

Q. Who were the calls transferred by?

A. By the secretary who would have answered the phone.

Q. Whose secretary?

A. Mr. Atwell's secretary.

Q. What was her name?

A. There were several. The one that I can think of [6347] offhand is Doreen Hickey.

Q. How about Rosalie M. Stern?

A. Yes, she was Mr. Atwell's secretary at one time.

Q. Now you say Mr. Atwell became aware some time in 1969, is that correct?

A. That is correct.

Q. How did he become aware in 1969?

A. Through a discussion in his office and some particular day in 1969 he discovered that I was then making verification calls and became very upset about it. And he subsequently told me verbally and in writing to make no more verification calls.

Q. How did this conversation come about?

A. I don't really recall.

Q. Who raised this subject?

A. I can't recall that, either.

Q. Then do you or do you not know how Mr. Atwell found out that you were making verification calls?

A. All I can say is it was through a discussion we were having in his office and this information came out. I don't know what the discussion was about.

Q. Do you know whether or not Mr. Atwell was making verification calls at that time?

A. No, I do not know this.

• • • • •

[6353] Q. Did you ever get a complete set of price sheets regarding a price change from a competitor?

A. Yes, I did, given to me by Mr. Atwell.

Q. When was that?

A. That was in 1965, following the announcement of a large price change by the United States Gypsum Company.

Q. Were these price sheets in mint condition?

[6354] A. I don't know what you mean by a "mint condition." They were a set of very neat papers, yes.

Q. Were they brand new?

A. Yes, they were.

Q. What use did you make of those price sheets?

A. We analyzed those in regards to or in conjunction with our own prices at that particular time, to see what differences there may have been, analyzed what changes these price bulletins had generated in the field.

Q. These were United States Gypsum price sheets, were they not?

A. That is corect. we refer to—we prefer to call them price bulleins, not price sheets. This was the type of document that we had at that time.

Price sheets were generally an internal sheet that was in a price or a salesman's price book.

We referred to these as price bulletins that were send out to customers, not through the sales people.

Q. Had you at the time that you received these price bulletins, as you call them, yet announced your own prices for that price increase?

A. No, we had not.

Q. Were you in the process of preparing your own price lists at that time?

A. When those bulletins were received?

[6355] Q. That's correct.

A. Yes, we were.

Q. How did National Gypsum Company's prices compare with the United States Gypsum Company's prices after the both of you had announced the December 15, 1965 price increase?

A. With exceptions, they were generally very close.

Q. What do you mean by "very close"?

A. Well, it depends on market conditions in the locality of a plant, but in the major sections of the country, the prices on major products would have been the same.

• • • • •

CROSS-EXAMINATION

[6363] Q. Now, you were trying—as I understand your testimony—to get out an announcement in advance of November 25, 1965?

A. That is correct. And our bulletins were dated the 24th.

Q. Do you recall when you began your work to try to assemble National's announcement and price bulletins?

A. We stated work on those the afternoon of the 17th.

The COURT. What happened on that day that you can remember that?

The WITNESS. What happened on that day? That was the first information that we had received in Buffalo that the United States Gypsum bulletin was in the field.

The COURT. I see. All right.

By Mr. DELONE:

Q. And do you recall whether or not you worked in preparing the National announcement over the weekend, Saturday the 20th and Sunday the 21st?

A. From the 17th on, anybody that was available was [6364] working on these bulletins to get them prepared for mailing. We did work over the weekend.

Q. And do you recall whether or not you received information from the field as to various of the announcements that had been distributed by U.S. Gypsum, including price bulletin data for particular areas?

A. Yes, we did.

• • • • •

[6366] • • •

Q. You were asked about what started this work on the [6367] 17th. When did you first hear that USG was out with an announcement to become effective December 15, 1965?

A. On the morning of the 17th.

Q. Where were you?

A. In Ken Atwell's office.

Q. And how did you learn that USG was out with an announcement?

A. One of our regional managers, Mr. Jack Hayes, rushed into Ken's office, indicating that he was in conversation by phone with Mr. Wright, who was our division manager in Chicago, and Mr. Wright had picked up a copy of the United States Gypsum bulletin and had read it to Mr. Hayes over the phone.

• • • • •

[6369] Q. So far as—do I understand—withdraw that. Did you ever observe Mr. Atwell when he was making such a—making a verification call, calling a competitor to check on a report from the field?

A. Yes.

Q. Did you work closely with him over the years, and particularly in the period 1968, 1969, up till you left National in 1970?

A. Yes, I did.

Q. You were his assistant during that period; is that correct?

A. That is correct.

Q. And do you recall whether you ever heard Mr. Atwell involved in any verification call with a competitor after January—after—or at any time in 1969?

A. Not that I can recall.

• • • • •

[6371] Q. You mentioned something about Atwell having established the guidelines which you should follow when you were determining whether or not to meet one of these competitive prices that had been reported from the field. Do you recall that?

A. Not the guidelines so much as the extent of our responsibility or our—as far as we could go in authorizing a lower competitive price.

Q. In other words, he set the limits? Would you illustrate what you mean by that?

A. Let's say in a market like Memphis, we had encountered two five-percent discounts off the list price. He might say, "With sufficient proof three fives exist, you can meet three fives. Do not go beyond this without discussing it with me."

Q. And in any of those guidelines, did he ever instruct [6372] you that you should call competition to determine the accuracy of the report?

A. Well, the times that I would have personally called a competitor would have been when something very unusual was reported within the market. Let's say that there were two fives in the particular market, on the first report of a third five without concrete proof that the third five was there, this was a time we might verify.

Q. But my question was, did Mr. Atwell ever instruct you to make such a call?

A. No, sir.

Q. What caused you to do it?

A. Doing everything we could to attempt to avoid giving somebody a lower price than the competitor's.

The COURT. You thought this up all by yourself?

The WITNESS. No, sir, I didn't. I had heard Mr. Atwell made calls. I had been to some schools on antitrust at which this matter had been discussed.

By Mr. DELONE:

Q. Well, now, you mentioned something about the volume of the requests to meet competition being extensive or vast. I can't remember the term you used. Do you remember mentioning that during your direct testimony?

A. Yes.

[6373] Q. That is the volume of these requests to meet competition that were flowing into your office in Buffalo from the field sales force all over the country?

A. That is correct.

Q. And do you recall that volume was particularly heavy in the year 1965?

A. 1965, it was very, very heavy.

Q. And do you recall whether it was particularly heavy in the year 1968?

A. In 1968, to the best of my knowledge, it was very heavy.

Q. And you had authority, within certain ranges, to approve these requests?

A. That is correct.

Q. What were you required to know before you approved one? What were you looking for? What were the standards you applied in determining whether or not to approve them?

A. We were looking for some type of proof to ascertain the price or the reported price actually existed to a customer within that marketplace before meeting that reported price.

Q. And would you give some idea of how many instances you were satisfied and authorized meeting the competition on the basis of the reports and data which was shipped up to you by the field, as compared to those cases [6374] where you felt it was necessary, because there was something unusual, to make a call to a competitor?

A. The number that we met as opposed to the number that we did not meet?

Q. No. I guess I didn't make the question clear.

The number you met simply on the basis of the information given you by the field sales force, as against the number you met only after you had verified a price with a competitor.

A. The number of times I, myself, verified would have been very, very small in relationship to the number of reports being received.

Q. And in relation to the number of reports received, what were the percentage you met of those received?

A. That is very difficult to answer. I couldn't really answer. If you listened to our sales force, they would say we never met them.

Q. What is your best recollection? I don't expect a precise figure.

A. If I were to hazard a guess, I would say 40 percent met, 60 percent rejected.

Mr. DeLone. Would Your Honor indulge me just a moment?

By Mr. DeLone:

Q. Now, you indicated, as I understand it, Mr. Webster, [6375] there was a period of time in 1969 when you didn't call any of these—you didn't make any of these so-called verification calls.

A. That is correct.

Q. And then you started up again or did make some in the latter part of 1969?

A. That is correct.

Q. Why did you not make them in the earlier part, and why did you make them in the latter part? That is a double question, but you break it down, if you want, or if you can handle it that way, go ahead.

A. In the earlier part of the year, in a discussion with one of our counsel, while working with him on other matters, he mentioned this Container case and advised me, at that time, there was some question about the program of verification with competitors, and, since there was a question involved, I no longer made any calls at that particular time.

Then, later on in the year, I did receive a phone call on verification from another competitor, who I had been advised by the competitor no longer would receive or accept verification calls, and after that call from him, I guess I assumed that the probem had been resolved and again did make a few verification calls.

[6376] By Mr. DeLone:

Q. Then you said that there came a time when in some conversations with Mr. Atwell, that the full nature of which you don't recall, the fact that you had made some verification calls in late 1969 came out.

A. That is correct.

Q. And you indicated that Mr. Atwell expressed chagrin. What was——

A. He was rather upset.

Q. And you also indicated he told you to stop or you said cease and desist. I don't know if you said that. Some others have used that term.

A. He told me verbally and in writing to make no verification calls.

Mr. DeLone. May the witness have Government 26, please.

The Court. Is that the written instruction not to do it?

Mr. DeLone. Yes, sir.

The Court. We have heard it. Let's not repeat it.

Mr. DeLone. I simply——

The Court. The jury has heard it.

Mr. DeLone. I am not going to read it, sir. I wanted to be sure this is the written instruction [6377] he has referred to.

By Mr. DeLone.

Q. Do you have Government Exhibit 26 there?

Is that the document you have reference to, the instruction not to verify?

A. Yes.

Mr. DeLone. I have no further questions.

The Court. Does anybody have any other questions?

Mr. Keck.

CROSS-EXAMINATION

By Mr. Keck:

Q. Mr. Webster, on direct examination you recalled making some calls with a gentleman from Flintkote, Celotex, Republic and Grand Rapids. Do you recall?

A. Yes, sir.

Q. But not with Georgia-Pacific or United States Gypsum?

A. I have no recollection of any call with either one of those manufacturers.

Q. Either calls coming from you or calls that you made?

A. That is correct.

Q. Regarding verification?

[6378] A. Yes, sir.

Q. How about Kaiser Gypsum Company?

A. No calls either to or from Kaiser on verification. I had a small amount of contact with them on intraindustry sales.

Q. American Gypsum?

A. No, sir.

Q. Dierks or Weyerhauser?
A. No, sir.
Q. Fibreboard?
A. No, sir, not that I can recall.
Q. Johns-Manville?
A. No, sir.

• • • • • •

[6380] • • •

REDIRECT EXAMINATION

By Mr. SCHMOLL:

Q. Mr. Webster, you testified on cross-examination the first word at National of United States Gypsum's announcement of the December 15, 1965 price increase was received from a Mr. Wright, your division manager in Chicago, is that correct?
A. That's my understanding, yes.
Q. Did you talk to Mr. Wright?
A. I did not.
Q. How did you learn that this was the first word that had been received of United States Gypsum—
The COURT. He said all this once, you know.
Mr. SCHMOLL. I am only trying to establish how, Your Honor, for the very limited purpose of showing that he did not learn of this of his own personal—
The COURT. Didn't you say that [6381] somebody came rushing in a room and said that he was talking to Mr. Wright and Mr. Wright told him?
The WITNESS. Yes.
The COURT. Now, what more do you want to bring out?
Mr. SCHMOLL. I just want to lay that foundation.
The COURT. All right. You got the foundation.
Mr. SCHMOLL. OK.

By Mr. SCHMOLL:

Q. Isn't it a fact, Mr. Webster, that Mr. Wright did not send in the information regarding the United States Gypsum announcement until November 18 and not the 17th?
A. That I don't know.
Mr. SCHMOLL. I read from Government Exhibit 520, which is in evidence.

Mr. Grainer, would you hand the witness Government Exhibit 520?
Mr. DELONE. Give me a moment, please.

By Mr. SCHMOLL:

Q. Mr. Webster, have you ever seen that before?
A. This or one just like it, yes.
Q. Would you look at the last page, please? Can [6382] you describe that?
A. It is an envelope to Mr. Hayes.
Q. And what is the postmark?
Mr. WARNKE. Object to the question, Your Honor. The witness has testified previously that Mr. Wright telephoned the information in. There has been no talk about any mailing.
The COURT. Well, I think the witness is able to answer these kind of things. Go ahead.
Mr. DELONE. I will stipulate to the postmark on the document. It is November 18.
The COURT. All right.
Mr. SCHMOLL. The afternoon of November 18.
Mr. DELONE. That's what it says, p.m., that's correct.

By Mr. SCHMOLL:

Q. Do you know a Mr. Bobbitt?
A. Yes, I do.
The COURT. Did Mr. Wright telephone that thing before he sent that in?
The WITNESS. I would have to assume that, Your Honor, yes.
Mr. SCHMOLL. Object to any assumptions by the witness.
[6383] The WITNESS. Well, I know that he telephoned it in, and then he would have put it in the mail.
Now, when it was mailed or when it was received, I don't know.
The COURT. All right.

By Mr. SCHMOLL:

Q. Do you know a Mr. Bobbitt?
A. Yes, I do.
Q. Who is he?
A. He was a division manager in the Texas market.

Q. Isn't it a fact that Mr. Bobbitt did not send any information regarding United States Gypsum's announcement until November 18?

A. I don't know what date he would have sent it in.

Mr. SCHMOLL. Mr. Grainer, would you hand the witness National Gypsum Company Exhibits 25 and 26?

The COURT. When I asked you didn't he telephone, I want to know did you testify that that's what he did?

The WITNESS. Yes, sir, I did.

The COURT. All right.

Mr. DELONE. I will stipulate with you about those two, if you wish.

Mr. SCHMOLL. Your Honor, could we have [6384] a limiting instruction that what Mr. Webster has testified regarding the receipt of information of the United States Gypsum Company's announcement of the December 15, 1965 price increase should not be admitted for the truth of what was said, but only for the fact that he heard, for what his testimony contains?

The COURT. The testimony is, as I recall it, and you correct me if I am not right, that you were in Mr. Atwell's office when a Mr.—was it Mr. Burch?

The WITNESS. Mr. Hayes.

The COURT. Mr. Hayes came rushing in and said that he had just talked to——

The WITNESS. Mr. Wright.

The COURT. Mr. Wright on the telephone and that there was a new price bulletin out.

Now, do you know what date that was?

The WITNESS. 17th, sir.

Mr. FRICANO. That's hearsay.

Mr. SCHMOLL. That's two levels of hearsay, Your Honor.

The COURT. It is not hearsay that sombody came rushing in and said, "I got a message."

Mr. SCHMOLL. That's correct, but——

The COURT. And that that was on [6385] the 17th isn't hearsay.

Mr. FRICANO. It can't establish the truth of it.

The COURT. The only relevance is the date. That's all that is relevant about the whole business.

By Mr. SCHMOLL:

Q. Now (isn't it a fact that Mr. Robbitt did not send in information regarding the December 15, 1965, price increase announcement of United States Gypsum until the 18th?

Mr. DELONE. I will stipulate to that.

Mr. FRICANO. Ask him to stipulate to the others.

• • • • •

[6389] • • •

Mr. SCHMOLL. Excuse me, there is no "previous."

The COURT. What is the date of the wire?

Mr. SCHMOLL. The date of this wire is November 19, 1965——

Mr. DELONE. Would you continue?

Mr. SCHMOLL. [continuing]. "We are endeavoring—"

[6390] This is out of quote.

> "We are endeavoring through our field sales force to pick up USG price lists of all zones for our study and will advise you ASAP as to our policy."

And the name "Jay Nicely."

By Mr. SCHMOLL:

Q. Now, at this meeting on November 17, who was present?

A. This wasn't an actual meeting now. I was in Mr. Atwell's office.

Q. Who was present in Mr. Atwell's office?

A. There was one other gentleman there, and I don't recall who it was.

Q. Was Mr. Atwell there?

A. Yes, he was.

Q. Had Mr. Atwell been in the office all day?

A. Yes, he had.

Q. How long did the meeting last?

A. I think you are mistaken now when you say "a meeting." This wasn't a meeting. We were in his office for some purpose.

Now, immediately after Mr. Hayes came in with the information about the United States Gypsum bulletin, if we were in a meeting, that meeting broke up and everybody went their way in a hurry.

[6394] RE-CROSS-EXAMINATION

By Mr. DeLone:

Q. With reference to the period in 1969 after you resumed verification—as you now said on redirect—following a call from Flintkote, do you know, or give us your best recollection of how many verification calls you received in this latter part of 1969 after you resumed verifying?

A. I can't give you a number, but it would have been very few.

Q. Can you give us an approximation? Your best judgment, range.

A. Four, five, six maybe.

• • • • •

[6395] Q. And do you know whether any of those calls which you received from a competitor in the latter part of 1969 were calls which were transferred to you because the caller had been unable to reach Mr. Atwell?

A. I can't recall that, but I would not think so, because I had my own rapport with those gentlemen at that time.

Q. And after you had your meeting with Mr. Atwell and received GX 26 in December of 1969, when you were instructed not to make such calls, did you ever, thereafter, make or respond to a verification call?

• • • • •

The Witness. I made no calls after that [6396] date, and, if a call had come in, I would have refused to reply.

• • • • •

[6399] REDIRECT EXAMINATION

By Mr. Fricano:

Q. Now, Mr. Montgomery, just to clear it up, was that document—is that a copy of the original?

A. Yes, it is.

Q. And was that document produced prior to December 27, 1973?

A. It was.

Q. Have any entries been made on the copy that you have

[6400] in your hand since December 27, 1973?

A. No, none whatsoever.

• • • • •

[6410] LOREN OLSEN

DIRECT EXAMINATION

By Mr. Mullin:

Q. Have you ever been empoyed by a corporation engaged in the manufacture or sale of gypsum wallboard?

A. Yes.

Q. What is that corporation?

A. Kaiser Gypsum Company.

Q. Would you relate for us, please, your—the positions you held, the period of time you held them, in Kaiser Gypsum Company, from when you began through December, 1973.

A. I was hired by Kaiser Gypsum Company in August of 1957, with responsibilities in the general traffic work, rate work. Shortly after that, I was made traffic supervisor, [6411] and, subsequent to that, I was made assistant traffic manager, and, in the late sixties, I was made general traffic manager. In the early seventies, I was promoted to general traffic and distribution manager.

Q. When you say in the mid sixties, you were made general traffic manager, would that be as of 1965?

A. Yes, sir. Well, about that time, yes.

Q. And would it be fair to say, sir, that from the time you became the general traffic manager of Kaiser Gypsum Company, you were the principal official of Kaiser Gypsum Company with regard to traffic and packaging and handling matters?

A. Yes, sir.

• • • • •

Q. Did you come to participate in the activities of the Gypsum Association?

A. I participated in the activities, initially, of the Traffic Committee of the Gypsum Association.

Q. And did you later come to participate in any other [6412] committees?

A. The Materials Handling Committee, which, at that time, was a subdivision of the Traffic Committee.

Q. And was this about the time you became the general traffic manager?

A. Yes, sir.

Q. Which I believe you testified, you believe, to the best of your recollection, was 1965?

A. Yes.

Q. And did you remain a member of the Traffic and the Materials Handling Committees up through and including 1973?

A. Yes.

Q. And did those committees continue to meet for that entire period?

A. Yes.

Q. Did you ever hold any office on those committees?

A. Yes.

Q. And what offices did you hold?

A. I was vice chairman of the Traffic Committee and chairman of the—and then chairman of the Traffic Committee. I was also chairman of the West Coast Task Force.

Q. And that was of the Materials Handling Committee?

A. Both the Traffic and Materials Handling Committee.

Q. And could you give us the time frame within which you were chairman of the West Coast Task Force?

[6413] A. Late 1960's.

Q. Do you know when that task force was first set up?

A. '65 or '66, I believe.

Q. And you continued as chairman for several years?

A. Yes.

• • • • •

[6414] Q. I see. So that the members of the Materials Handling Committee would normally be the most senior official in the materials handling filed for the member company?

A. I would say that would be true; yes.

• • • • •

[6439] Mr. MULLIN. I ask that the witness be shown Government Exhibit 1815, please. Also 1816, 1817 and 1818.

By Mr. MULLIN:

Q. I would ask you to look at 1815 first, please.

A. Yes.

Q. Do you recognize that document?

A. Yes.

Q. Could you tell us what it is?

A. It is a memorandum dated January 10, 1966 from me to R. C. Crowle, again, a Kaiser Gypsum Company interoffice memorandum.

Mr. MULLIN. I offer the exhibit.

Mr. HIERING. No objection, Your Honor.

The COURT. Admitted.

[Government Exhibit No. 1815 was received in evidence.]

Mr. MULLIN. I would like to read the exhibit to the jury, Your Honor. It is only a few paragraphs.

From Mr. Olsen to Mr. Crowle on December—dated January 10, 1966.

> On December 28 you ask if I could develop some [6440] information regarding railcars and truckloading and packaging practices now being followed by the East Coast gypsum companies.
>
> I asked National Gypsum Company and U.S. Gypsum Company certain questions regarding these practices on the East Coast and I now have a reply from National. Attached is copy of National's reply together with their Bulletin No. 202 which they mention. As soon as I receive a reply from U.S.G. I will let you know.
>
> After you have a chance to review this perhaps we should get together and formulate some similar instructions for the eastern sales people.

By Mr. MULLIN:

Q. I would ask that you look at Government Exhibit 1816, please.

Do you recognize that document?

A. Yes, sir, I do.

Q. Could you tell us what that is, please?

A. It is a letter dated January 3 from Dan Dansereau of National Gypsum Company to me.

Q. And is there an attachment to that?

A. Yes, there is a standard loading bulletin attached to it.

Q. And is this the document you referred to in [6441] Government Exhibit 1815?

A. I would assume so, yes, sir.

Mr. MULLIN. I offer the exhibit, Your Honor.

Mr. HIERING. No objection, Your Honor.

The COURT. Admitted.

[Government Exhibit No. 1816 was received in evidence.]

• • • • •

[6442] Q. Now at this time in January, 1966, did Kaiser Gypsum Company—had you just opened your New Jersey plant, is that correct?

A. About that time, yes.

Q. And was this the first plant that Kaiser Gypsum had in the Northeast marketing region?

A. Yes, sir.

Q. So that this was a market entry by Kaiser, was it not?

A. Yes, sir.

Q. And these documents relate to what practices Kaiser Gypsum Company was going to follow with regard to packaging and handling of its products from its New Jersey plant, is that not correct?

A. It was the basis of our formulating a program of what we were going to do, yes.

Q. And this was based upon what your competitors were doing, was it not?

A. To some degree, yes.

• • • • •

[6444] Q. I would ask you to re-look at the attachment which is Gold Bond Bulletin No. 202.

Mr. MULLIN. I don't propose to read that document, Your Honor. It is kind of lengthy. But I [6445] would like to just read who it is directed to.

It is directed to All Dealer Salesmen, Division Manager, District Managers, District Offices, Gypsum Plant Managers and Sales Order Supervisors Material Handling Department.

By Mr. MULLIN:

Q. Mr. Olsen, is it fair to say this Gold Bond Bulletin No. 202 is the internal packaging and handling policy of National Gypsum Company?

A. I would assume so, yes.

• • • • •

[6448] Q. Now, Mr. Olsen, did you, pursuant to the information that you had received from National Gypsum Company and the United States Gypsum Company, formulate packaging and handling procedures for Kaiser Gypsum Company which track and follow the material you received from those two companies?

A. Track and follow.

The COURT. Were they the same, Mr. Olsen?

The WITNESS. They were not the same. They were the same in some respects, but they were not identical.

By Mr. MULLIN:

Q. Would it be fair to say that they were substantially similar?

A. Substantially similar.

[Discussion off the record.]

[6451] CROSS-EXAMINATION

By Mr. HEIRING:

Q. Mr. Olsen, did your plants get requests from time to time from customers for special packaging or special loading requirements of the customers?

A. Yes, they did.

Q. And, to your knowledge, when you received those requests, did you honor them?

A. Yes.

• • • • •

[6455] Q. Now, you referred in your direct examination to A.A.R. requirements. Could you explain what the A.A.R. is?

[6456] A. It is the Association of American Railroads.

Q. Did the Association of American Railroads have requirements relating to the loading of rail flatcars for gypsum wallboard?

A. The A.A.R. prescribes loading techniques for all commodities on both boxcars and flatcars.

At this point in history the A.A.R. did not prescribe loading methods for loading on open cars, just closed cars. Down through the years the committee had worked closely with the A.A.R. and eventually formulated, prescribed loading methods that are mandatory for gypsum wallboard on open cars.

• • • • •

[6467] WARREN CECIL

DIRECT EXAMINATION

By Mr. THORSON:

Q. Mr. Cecil, would you state your full name and address, please?

A. My full name is Warren Cecil. I live in Hinsdale, Illinois, 25 South County Line Road.

Q. What is your occupation?

A. I am a partner in the firm of Arthur Anderson [6468] Company, an independent public accounting firm.

• • • • •

[6471]

By Mr. THORSON:

Q. Would you explain when and how Arthur Anderson became engaged by U.S. Gypsum for this project?

The COURT. And what it was.

The WITNESS. I'll do the best I can.

The U.S. Gypsum Company contacted the managing [6472] partner in our office, Donald Erickson, and asked us to be of service to them. This service consisted of, in the final analysis, of my receiving telephone calls from representatives of U.S. Gypsum's competitor companies, my obligation being to the

caller, merely to state whether or not a specific job about which the caller inquired was or was not on the commitment register furnished us by U.S. Gypsum Company.

To that end I did receive calls and I did answer whether or not the actual job about which they inquired was or was not on that register. And I considered that the full scope of my responsibility to the caller and to U.S. Gypsum Company.

The COURT. All right.

Now determine what that register was, who was on that register.

Mr. Mr. THORSON:

Q. What information appeared on the register that was provided by U.S. Gypsum?

A. It itemized the jobs, projects that U.S. Gypsum had knowledge of to which they committed themselves to honoring the price that they had quoted thereon as of a particular date certain, whatever that date was. I do not recall that date.

Q. Did you undertake to manage this project on behalf [6473] of Arthur Anderson?

A. I undertook, since I was in the office and could handle, receive calls and answer or respond to the inquiries to which I previously referred, which I did.

• • • • •

[6477] Q. Now refer, if you would, to the last page of the document 610, and particularly to the paragraph marked paragraph E. Is that the footnote that was referred to in your file memorandum of February 17, 1866?

A. It is.

Q. Now what was the language in this footnote that prompted or caused the concern by U.S. Gypsum?

A. I do not know what caused the concern. I do not know what the concern was. I can't really answer the question.

Mr. THORSON. If Your Honor please, I would like to read to the jury a portion of Mr. Cecil's file memorandum, which is GX 611. This portion starts with, "They seem to be concerned."

By Mr. THORSON:

Q. That refers to U.S. Gypsum, does it not, Mr. Cecil?

A. Yes.

• • • • •

[6479] Q. Who in U.S. Gypsum were you contacting at this time?

A. My letter of February 1 was written to the attention of Mr. G. R. Evans.

The COURT. If after you have heard this, Mr. Hiering, you want more read, we will have it read.

By Mr. THORSON:

Q. Now, the footnote refers to a Mr. Sikes. Do you know who he was?

A. Mr. Sikes was one of the callers and I see by this list that he was calling on behalf of Bestwall Gypsum Division of Georgia-Pacific Corporation.

Q. In connection with this footnote, did you have any conversations, any telephone conversations with Mr. Evans?

A. The document dated February 17, your Exhibit 611 I note in the first sentence on Wednesday, February 16, Mr. Robert Evans of U. S. Gypsum called to state that their attorneys had reviewed the letter report we submitted dated February 1, 1966, so I guess that is a call from Mr. Evans, yes.

[6480] Q. If you refer to the entry on your log which is GX 609, the entry for February 16, 1966, does that allude to the same subject?

A. What was your document number, please?

Q. Your log of contacts, which is GX 609.

A. The date again, please?

Q. The entry for February 16, 1966.

A. I have it here.

[6481] By Mr. THORSON:

Q. Now, this entry states:

> Bob Evans, U. S. Gypsum, called and said to leave February 1, 1966 letter stand as is.

Would you explain what that means?

A. Well, the date of February 1 is the letter which we have previously referred to, and I would interpret it to mean let stand as is, just no change, no comment, just as it is.

Q. Does that mean that was some prior discussion as to whether the letter should be revoked or modified in some way?

A. There was no discussion at any time as far as I know about any modification of things that I submitted.

Q. Well, continuing in your entry on February 16, you state, "Prepare one—" correct me if I can't read your handwriting, Mr. Cecil.

A. Right.

Q. "Prepare one at end of each month except omit footnotes such as (e) on February 1, 1966 report."

A. My note does state that.

Q. Was that an instruction that you received from Mr. Evans of U. S. Gypsum?

A. That is a comment that Mr. Gypsum made just as I have noted here.

[6482] Q. By "Mr. Gypsum," you mean Mr. Evans?

A. Mr. Evans. Excuse me.

Q. Did Mr. Evans tell you why he did not wish to have comments such as footnote (e) appear on subsequent reports?

A. No, he did not.

Q. Did you ask him why?

A. No, I did not. It didn't seem to have no concern.

Q. But the footnote did refer to a communication between Mr. Sikes and Mr. Evans, did it not, a direct communication?

A. The numbers, was that in No. 610?

Q. That is in your memorandum, GX 611.

Mr. MELLOTT. If the Court please, could we just have footnote (e) read to the jury and cover the matter?

The COURT. Well, are we going to have it read, Mr. Thorson?

Mr. THORSON. I would be happy to read it, Your Honor.

The footnote "(e)" reads as follows:

> Mr. Sikes inquired whether a project entitled 'Public Housing' in Shelby, North Carolina, through a dealer or applicator by the name of Lowes was listed in the commitment register. We informed him [6483] that a project entitled 'Low Rent Housing, North Carolina, 34-1 and 34-2' was listed, but that Lowes was not mentioned.

We suggested that he call Mr. Evans for clarification since there was a possibility that the two job titles might be referring to the same job. We were later informed that Mr. Evans discussed the matter with Mr. Sikes.

By Mr. THORSON:

Q. Now, Mr. Cecil, who informed you that Mr. Evans discussed the matter with Mr. Sikes?

A. I do not recall specifically, but it was either Mr. Evans or his secretary.

Q. And thereafter, in subsequent reports, did you omit footnotes such as footnote "(e)", as suggested by Mr. Evans of U.S. Gypsum?

A. I have no knowledge of anything of that type that I omitted, because, I guess, there was nothing of that same type repeated.

Q. Mr. Cecil, do you have Exhibit GX 613?

A. I do.

Q. Can you identify that document?

A. It is the letter from Mr. Evans of U.S. Gypsum Company to Arthur Anderson Company, to my attention, dated March 28, 1966.

[6484] Q. And was that from Mr. Evans of the U. S. Gypsum Company?

A. Yes, it was.

Mr. THORSON. Your Honor, I offer in evidence GX 613.

Mr. HIERING. No objection, Your Honor.

The COURT. Admitted.

[Government Exhibit No. 613 was received in evidence.]

Mr. THORSON. If Your Honor please, I would like to read this letter to the jury.

Attention: Mr. Warren Cecil. Gentlemen: As you know, at monthly intervals you have furnished us with a list of the telephone calls which have been directed to Mr. Cecil in accordance with a letter which we wrote to our competitors back in December.

Based on our experience in the past two and one-half months, we are of the opinion that the list of telephone calls serves no useful purpose to us, and therefore we are requesting that you discontinue the maintenance of a list of such calls.

Since we do not believe that we will have any use for the list of inquiries made since our letter [6485] was directed to our competitors, we have no objection to your disposing of the list if you no longer have need for it. Very truly yours, G. R. Evans.

By Mr. THORSON:

Q. And this is dated March 28, 1966, is it not?

A. Yes, sir.

Q. At that time did Mr. Evans instruct you to discontinue the service of providing the information to competitors?

The COURT. You just read the letter, didn't you?

Mr. THORSON. Yes, Your Honor.

The COURT. You mean outside the letter?

Mr. THORSON. No. The letter refers to the maintenance of a list. What I am asking Mr. Cecil now is whether he was instructed to discontinue providing answers to calls from competitors.

The COURT. You mean not in the letter? That was my inquiry of you.

Mr. THORSON. Yes, Your Honor, aside from the letter.

The COURT. All right.

The WITNESS. I have no recall of any instruction or request like that to discontinue our service.

[6486] By Mr. THORSON:

Q. Did you follow Mr. Evans' suggestion of disposing of the list?

A. No, I did not. I didn't dispose of the things that I prepared.

• • • • •

[6487]

Q. Did Mr. Gimlin tell you that the price increase effective just two days prior to that entry had actually gone into effect, and that everybody else, all the major competitors of U.S. Gypsum had gone along with it?

A. Our discussions at no time pertained to prices.

Q. When you say your "discussion," you mean your discussions with Mr. Gimlin or with the competitors who called in?

A. My discussion with Mr. Gimlin and the competitors. There was no reference to prices. I was furnished no information on prices and could not comment on prices.

Q. Well, isn't it not true that on occasion Mr. Sikes inquired of you as to prices quoted on certain projects?

A. No, sir, not to the best of my knowledge.

Q. Would you refer to your entry of January 21, 1966?

A. Yes, sir. I have it.

Q. Does your entry there make any reference to prices?

A. Allow me to read down through it.

This substantiates my earlier comment. He then asked if I were free to give him the price at which committed, referring to a particular job. I stated that [6488] I did not have this information and that Mr. Gimlin would be the appropriate person to call.

He mentioned that there were many different pricing arrangements existing prior to a date certain.

That's the extent of my entry at that time.

Q. And when you used the word "he," who are you referring to?

A. Mr. — the caller, Mr. Sikes.

• • • • •

[6495] CROSS-EXAMINATION

By Mr. HEIRING:

Q. Mr. Cecil, exactly what did this commitment register consist of? What was the information that was on it?

A. It was an itemization of jobs that U.S. Gypsum had knowledge about for which they had made a commitment to sell certain quantities of products to the dealer or customer.

Q. I show you what is marked Defendant U.S.G. Exhibit 138 and ask if you will tell us what that is?

A. This is a copy of the commitment register transmitted under date of January 17th by Mr. Weiser of U.S. Gypsum Company to me.

The COURT. Mr. Cecil, is it correct that you didn't necessarily know why people were on that list and didn't care, your job was merely to say, "Yes, they are on it." or, "No, they aren't."

The WITNESS. You have correctly described my job. And as to the whys and wherefores, you have also correctly stated it.

• • • • •

[6497] Q. Was there ever any price information on any of these registers that you had received, Mr. Cecil.

A. No, sir.

Q. And was it your understanding that when you received a call it was with regard to whether or not a specific job was listed under the column entitled "Job Name or Location;" is that correct?

A. That's correct.

Q. And to that inquiry you were asked to answer "yes, it is" or "no, it is not;" is that correct?

A. That's correct.

Q. Over what period of time did you receive these calls?

A. I believe I indicated a few minutes ago that the latest call was dated March 18, 1966, and the first call was November 30, 1965.

Q. So the whole thing, as far as your receipt of calls was concerned, lasted for a period of just slightly over three and a half months; is that correct?

A. That's correct.

Q. And you received the first job commitment register from U.S. Gypsum when? Approximately when?

A. The first part of December.

Q. Of what year?

[6498] A. 1965.

Q. And then did you receive supplements to it from time to time?

A. Yes, I did.

Q. And how often were these received?

A. Every month or two. I don't recall the exact dates.

Q. And what was the purpose of the supplements?

A. I would say—use the word "update," so to speak. To record or to furnish me a fresh register on which had been recorded their shipments against the initial commitment.

Q. So that it would show the jobs that were left outstanding; is that correct?

A. That's correct.

Q. When did you receive the last supplement from U.S. Gypsum?

A. Well, this went on for a few months after my contact. I'd say late in 1966 or very early in '67.

Q. Would it refresh your recollection to look at Defendant U.S.G. Exhibit 138 that I just showed you, and call your attention to the cover letter?

A. The date of this transmittal letter is January 17, 1967. It refers to date of December 31, 1966 as being the date of the updated page of the register.

• • • • •

[6502] A. I believe the last call that I received, according to my log, was March 18, 1966.

Q. So the only log that you did have, you retained; is that not correct?

A. That is correct.

[6513] • • •

Mr. DeLone. The other things I wanted to go into, sir, is of somewhat more moment to me. It concerns something which happened during the redirect examination of Mr. Atwell, and I have reference to page 6201 of the transcript.

I have a copy here, sir, if it would, perhaps, simplify what I wish to deal with.

This is an exchange between Mr. Fricano and Mr. Atwell about sales of wallboard to other companies during periods of strike, and Your Honor will see, in the middle of the page, that Mr. Fricano posed a question: "You don't know anything about strike-breaking, Mr. Atwell?"

I objected. Your Honor sustained my objection.

In my view, this is another deliberate attempt by the prosecution to introduce, to use the vernacular of the case which was cited to Your Honor, another skunk into the jury box.

I can see no possible relevance, and Mr. Fricano must certainly have known that the strike-breaking question was improper, and, for that reason, I move for the declaration of a mistrial.

[6514] Mr. Fricano. If Your Honor please, may I respond to that?

The Court. Go ahead.

Mr. Fricano. I mean if it is necessary.

The Court. No. I recognize the point, Mr. DeLone. You have made a record of it, but I agree that it was improper. It should not have been done. Strike-breaking is an explosive term, and we are in Pittsburgh, which is a labor community, and I don't want another reference. I think we can do without that kind of thing, Mr. Fricano. I think it was improper. I think you did what you should not have done, and I hope that we can avoid the use of those kinds of terms in the future.

There was no reason at all, in the context of the record at that time, to use the words, "strike-breaking."

Mr. Fricano. If Your Honor please, I didn't open this up.

The Court. You used that language, and that's what I—I don't object to the subject being gone into. I do not like the use of the term, "strike-breaking," and I think that's Mr. DeLone's—the heart of Mr. DeLone's objection.

Mr. DeLone. Exactly.

The Court. And I am not going to [6515] declare a mistrial, but I caution you not to use that kind of language again.

All right.

Mr. DeLone. Your Honor understands I am in the position—I have no way of gauging, and none of us has, whether the smell of that question ever is removed from the jury box, and the only resort I have—I realize there is nothing more Your Honor can do than sustain my objection, short of declaring a mistrial, and, since I can't be certain what impact that had on the jury, I feel it is the only course I can take.

The Court. In a trial as lengthy as this one, I think the impact will be relatively slight by the time we get to any kind of determination in this case. I don't think the jury will remember it, whether or not Mr. Atwell was asked whether he was a strike-breaker or his company was a strike-breaker.

Mr. DeLone. That's something we all can only speculate about.

The Court. We can, but I don't think it is quite serious enough to justify the mistrial. For that reason, I am not going to do it.

All right. I would like to see Mr. Mellott at sidebar for something about a case, not this case, while we are bringing in the jury.

[6527] • • • COURT:

See, one thing I was thinking of, on some of these defense questions, if you do not file an income tax return, as you are required to by law, the fact you might have refused to file it because you didn't want the Government [6528] to know you were making money by writing numbers is not a defense for failing to file that income tax. Various people seemed, at one time, to say it was, but numerous courts have now said it isn't. This is what I am getting at now. It could be you were doing something for one purpose and it had that effect, but it also had another effect, and the legal purpose would not overcome the unlawful offense.

That is what I am getting at about some of these defenses. I have probably confused everybody, now.

Mr. FRICANO. No. I understand the Court perfectly. I see no problem. It is the application of a general intent crime.

The COURT. Well, for example, I don't think we would want to know—if somebody failed to file an income tax return, I don't think the evidence should show that he didn't have any other purpose, but that he just didn't file it would be admissible.

Mr. FRICANO. That's right.

The COURT. I think it would be irrelevant. I think what you are doing now may be irrelevant, but, since it may have some remote relevance, I will let it go in. I don't know what relevancy it would have.

Mr. FRICANO. If the Court please, I can probably, in one page, with a few citations, indicate to the Court the relevancy of this.

[6529] The COURT. I am going to let it go in, so save that paper for what may be, some day, a review by the wise men in the east.

• • • • •

JOHN T. NELSON

called as a witness, having been first duly sworn, was examined and testified as follows:

• • • • •

DIRECT EXAMINATION

By Mr. FRICANO:

Q. State your name and residence address, please.

A. John T. Nelson, 4303 Bristol Wood Road, Pleasanton, California.

Q. Were you ever employed by the Celotex Corporation?

A. I was.

Q. During what period of time, from what year to what [6530] year?

A. 1951 to 1971.

Q. Now, in what capacity were you employed by Celotex?

A. In various capacities. I started as a territorial sales representative, and, the last 10 years, I was district manager of the Oakland District.

Q. Now, what were your duties and responsibilities as district manager for the Oakland District?

A. To supervise a group of sales people and to administer an office and a small warehouse.

Q. How many salesmen did you have working for you, sir?

A. This varied, anything from eight to fourteen.

Q. Did you correspond by telegram, mail, and also by telephone with your superiors in Tampa, Florida, from time to time.

A. I did.

Q. Did this correspondence in documentary form and telephone calls ever relate to requests by you to get a deviation, charge customers less than the list price?

A. It did.

Q. Now, with whom did you communicate concerning these matters in Tampa, Florida?

A. Various people, depending on what the product was.

[6531] By Mr. FRICANO:

Q. All right.

On gypsum wallboard I will limit myself to this area exclusively, Mr. Nelson.

A. Okay.

Q. With whom did you communicate in Tampa, Florida? By the way, is Tampa, Florida the headquarters for Celotex?

A. Yes, it is.

Q. With whom did you communicate in Tampa, Florida on these matters, on gypsum wallboard?

A. It would have been Don Miller primarily. However at one time Warren Hill was working with Don Miller. And another

time there was another gentleman, I don't even remember his name.

Q. Jerry Fisch?

A. I think that's right.

• • • • •

[6532] Q. Well, did you from time to time sell to an organization known as Tacoma Drywall?

A. Yes, sir, we did.

Q. Was that a small customer, a medium-sized customer? How would you describe it in terms, of its importance to you?

A. Well, in the northwest market its importance to us, I would have to classify it as a major company. Now, how they might range with other manufacturers, I have no knowledge of.

Q. As far as you are concerned, Celotex?

A. It was looked at by me as a major customer.

Q. Now, were they in competition with another company known as Zellerback Paper Corporation?

A. They would have been a competitive gypsum dealer to Zellerback, yes.

• • • • •

[6533] Q. All right, sir.

Now, if you will look at the first one, which is 207 A to B. In that one dated June 21, 1966, it is a telegram——or a teletype, whatever you call it—from you to Mr. Miller in Tampa; correct?

A. Correct.

Q. And it reports on a situation whereby the Zellerback Paper Company is allegedly selling Flintkote five-eighths inch type fire-rated board to the drywall [6534] applicator trade at $74.50 per thousand; is that correct?

A. That's what it says, yes.

Q. And this is the current published dealer carload price; is that correct?

A. I don't reall the dealer carload price at that time, but obviously this is true.

Q. All right.

So would it be fair to say then that Zellerback is reselling at the same price that allegedly the dealer is paying to the manufacturer, according to this telegram?

A. That's true.

Q. Now, if you will review the rest of the document I will just ask you the general question.

Did you attempt at this time to get a connection for your customer, Tacoma Drywall, so that it could compete with Zellerback on this allegedly low price?

A. I am sure I did.

Q. If you will turn to the next exhibit, GX 209. Do you recognize the handwriting?

A. Yes, I do.

Q. Whose is it?

A. It is mine.

Q. And that is dated just a couple of days later, June 8, 1966; is it not?

A. July 8.

[6535] Q. I am sorry, July 8, 1966. And it says, "Tacoma Drywall" on it; does it not?

A. Yes.

Q. And underneath that is the name "Warren Hill?"

A. That's right.

Q. Is that the Mr. Hill who is sitting in the back of the courtroom right now?

A. Yes, it is.

Q. Now, he was Mr. Miller's assistant; was he not?

A. Yes, sir.

Q. Is this document here in your handwriting? Can you tell us what it purports to be? How did you come about writing it?

A. To the best of my knowledge, only because it was my practice to make some type of telephone notes during a telephone conversation, and since there is no other notation on this document, I would have to guess that it was something that I had gotten on the telephone.

Q. It was your practice to make such notes from time to time when you talked to Tampa, Florida?

A. Yes, it was.

Q. And this says—and I will read it to the jury.

"No price deviation to Zellerback."

Then in parentheses is, "Zellerback loaded up prices May 1st, no shipments since April 5."

[6536] And it says, "Blue Diamond."

Mr. DeLone. Could we have the date, please?

Mr. Fricano. I misread something. Mr. Schmoll has called it to my attention.

The date of the document is July 8, 1966. I said "prices" when I should have said "prior."

Zellerbeck loaded up prior to May 1. No shipment since April 5.

Then it says "Blue Diamond" at the bottom.

By Mr. Fricano:

Q. Now let's go on to the next.

Excuse me, do you recall where Mr. Hill got this information?

A. No, I don't.

Q. Do you know what it means?

A. At this point in time, no, other than that obviously was something that was said to me.

• • • • •

[6542] • • •

Q. Now, what did you mean when you said that "they [6543] would not tell me the name of the manufacturer because they say Fox Drywall was embarrassed when Blue Diamond criticized Zellerback for exposing their deal"?

A. Obviously this was something that was quoted to me by the owner-manager of Tacoma Drywall.

I don't recall the instance at this date, but if I had written the teletype, which I am sure I did, it had to be quotations that I had received from a Gerald Craker that was manager and owner of Tacoma Drywall.

Q. Now, in response to that exhibit, 215, if you will look at GX 216, Mr. Miller writes back to you, July 21, the same day, on a teletype, and he states:

> We will not deviate in price to meet USG or Kaiser alleged quotation to Tacoma Drywall Supply. Cannot understand your statement that Fox Drywall was embarrassed and suggest you discuss this with me someday when you are talking to Tampa on phone.

Did you ever talk to him on the phone about it, Mr. Nelson?

A. I talked to him on the phone at numerous times.

Q. Concerning this particular matter?

A. I am sure I did, sometime along the line, since this seems to go over a period of several weeks or so, why, I am sure that I must have talked to him on the phone.

Q. All right, sir.

[6544] The next document, 217, is in your handwriting and dated the same day as the Miller teletype to you saying phone me on the subject, is it not?

A. Yes, sir.

Mr. DeLone. May I have the date, please?

Mr. Fricano. July 21, 1966. This is Government Exihibit 217.

By Mr. Fricano:

Q. That is your handwriting, is it not?

A. Yes, it is.

Q. And it states, "Subject: Tacoma Drywall, telephone call from Miller," does it not?

A. Yes, sir.

Mr. Fricano. I will read this document in its entirety to the jury.

> "1. Cannot meet alleged quotation on five-eighths inch firok by Blue Diamond, Kaiser, or USG.
>
> "2. If quote was from American or Republic—still cannot meet.
>
> "3. From legal standpoint, attorneys insist we cannot sell at different prices unless proof of competitive manufacture price. This would violate the law.
>
> "If Tacoma Drywall can buy a carload and give us [6545] copy of invoice, this would be proof.
>
> "4. We don't think any major manufacturer has special price. Could your quote be American—GP—Republic.
>
> "5. Fox and Zellerbach—we have no contact with Blue Diamond nor have we had such. This is illegal (collusion). Neither Blue Diamond, Zellerbach or," looks like "Fox could possibly think so."

By Mr. Fricano:

Q. Mr. Nelson, did Mr. Miller tell you that he wasn't calling his competitors to check out prices?

A. At sometime during the period of the sixties, Don Miller, I believe, if I recall rightly, had said that he was not talking

to competitors. Whether it was at this instance or whether it was sometime prior or after, I do not recall.

Q. Did you believe him?

A. I had no reason not to believe him.

Q. And did you, on the basis of this information which you received, tell your salesmen that Mr. Miller had no way to check out situations with competitors?

A. I don't recall what action I may have taken. Since this seems to have been a hot issue at the moment, I must have reported something back to the salesman, yes. [6546]

Q. And this report is contained, is it not, in—well, indirectly contained in Government Exhibit 219, is it not, which is an internal Celotex memorandum dated July 25, 1966?

A. This was a letter that I received from a Jack Curran in Seattle. I did not write this letter.

Q. No, I understand that, sir.

A. He wrote it.

Q. Who's Mr. Curran?

A. He was the gypsum salesman in the Western Washington market.

[6547] By Mr. FRICANO:

Q. He was handling that important account for you, was he not?

A. Yes, sir, he was.

Q. Now this states subject 5/8 inch one-hour price protection Tacoma Drywall Supply dated July 25, 1966, four days after your handwritten notes of your telephone conversation with Mr. Miller.

> Tacoma Drywall Supply has obtained invoices from Lakes Drywall Company showing that Zellerbach Paper Company has been protecting a $74.50 5/8 inch one-hour board price to Fox Drywall of Tacoma for 500,000 feet of board. He is purchasing Blue Diamond gypsum at this price. This is all the more evidence since Mr. Don Fox of Fox Drywall is purchasing an interest in Tacoma Drywall Supply, our dealer outlet, but is still purchasing his 5/8 inch requirements from Zellerbach Paper because of this price protection.

> This pricing situation was made known to us by Jerry Craker of Lakes Drywall as he also needed protection on approximately 1,000,000 feet of 5/8 inch to compete and complete jobs he had contracted. This was strictly in confidence to the Celotex Corporation. Since this information was reported to us, it has evidently been relayed through management back to the [6548] Zellerbach people and Mr. Fox. However, he is still purchasing Blue Diamond 5/8 inch from them.

All right, sir.

GX 220, which is dated July 27, 1966, that is a letter from you to Mr. Miller with a copy to Mr. Lees, is it not?

A. Correct.

Q. Two days after Mr. Curran writes to you, correct?

A. Yes.

Q. And it states, "You received a copy of Jack Curran's letter of July 25 regarding the 5/8 inch one-hour Firestop board price to Tacoma Drywall.

> "What Curran says is basically the same as I have reported to you in letter, teletype and telephone over the past two months. Curran, of course, is wrong in his statement that our management relayed information given to us by Tacoma Drywall back to Blue Diamond, Zellerbach Paper and Fox Drywall. I have informed Curran that we have not and cannot have any contacts with a competitive manufacturer.

Mr. Nelson, did you, on reliance of what Mr. Miller told you on not having contact with competitors, so advise him and Mr. Lees two days later?

A. I am sorry. I don't understand your question.

Q. It wasn't very clear.

[6549] In reliance on what Mr. Miller told you, did you thereupon send a letter back to headquarters relating the situation, with a copy to Mr. Miller's superior, Mr. Lees, restating what Mr. Miller had told you about not contacting competitors?

A. Well, if you mean if I wrote the letter to Don Miller, I did. Mr. Lees I don't believe was Mr. Miller's superior. Mr. Lees was my superior. Miller was a product manager for the gypsum operation.

Q. Let me restate my question.

Did you, in reliance on what Mr. Miller had told you on July 25 put that paragraph into your letter back to him on July 27?

A. I am sure that after receiving the information from Miller about talking to competition, I probably—I obviously related that to Curran.

In turn, Curran wrote to me insisting the price deviation existed. So, in turn, I wrote the subsequent letter, I guess, to Miller with a copy to Lees.

Q. Did Mr. Miller on any other occasion, to your recollection, ever advise you that he had no contacts of competitors, because that would indicate collusion?

A. Sometime during the period that I was involved in the gypsum business, I believe Miller had said to me—whether it was at this instance, whether it was before or [6550] after, I do not recall—that he or we or the company, did not have any contacts with competitive manufacturers.

• • • • •

[6553] WARREN E. HILL, JR.

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

• • • • •

[6561] • • •

Q. Mr. Hill, didn't Mr. Miller on November 17, 1965, send out a memorandum to all district managers informing them that they should start getting ready for a price change as of December 15, 1965?

Mr. MONTGOMERY. Objection. Leading and suggestive.

• • • • •

[6569] • • •

By Mr. FRICANO:

Q. You don't recall a policy whereby—Do you ever recall anybody going through the files and pulling out certain files and shipping them off someplace else for destruction?

A. I have no recollection of such a policy, and I [6570] doubt very seriously that there was one.

Mr. FRICANO. May we have 2124, please.

I offer 2124.

Mr. MONTGOMERY. Your Honor, I object on the grounds of relevancy.

The COURT. Since I don't know what it is, I can't rule on it.

Mr. FRICANO. I will have the witness describe it, Your Honor.

The COURT. All right.

By Mr. FRICANO:

Q. Do you know a Miss or Mrs.—Ms. Phyllis Solomon?

A. No, I don't.

Q. Do you recall ever addressing a memorandum to her?

A. No, I don't.

Q. Would you please look at that document that is in front of you, 2124, and notice whose it is. Then turn 3, 4, 5 pages in. Do you have that?

A. Yes, sir.

Q. Is that a memorandum from you to Ms. Phyllis Solomon?

A. Excuse me.

Q. Maybe I miscounted.

[6571] A. I miscounted. Sorry.

It appears to be a memorandum under my name. I do not recall it specifically. I haven't read it.

[6572] By Mr. FRICANO:

Q. Does that refresh your recollection?

A. It doesn't. I do not recall writing this memo. However, I have no reason to dispute the fact that I probably did write the memo.

Mr. FRICANO. Can we have a stipulation with respect to the identification of Miss Phyllis Solomon?

The COURT. Read it, if you have a stipulation.

Mr. FRICANO. We don't have it in the stipulation. I was wondering if we could have one.

Mr. MONTGOMERY. I object to the relevancy of this document.

The COURT. I can't rule. I have no idea what the document is.

Mr. FRICANO. If I could characterize it just briefly without going into it——

The COURT. It would be better, I suppose, if I looked at it.

Mr. FRICANO. Would you hand the Court Clerk the entire folder?

Will the Court pay particular attention to the third paragraph and the date?

The COURT. It appears to be an affidavit of somebody. I will not admit somebody's affidavit [6573] in evidence.

Mr. FRICANO. This was produced in a prior proceeding in this matter.

The COURT. It may have been, but—at least, if there is an objection to it on that basis, I will not admit it.

Mr. MONTGOMERY. Yes.

Mr. FRICANO. All right.

I will withdraw my offer and call the witness.

The COURT. That is up to you.

By Mr. FRICANO:

Q. Having seen this document, now, and I realize you didn't read it in its entirely, did it refresh your recollection at all, sir, with respect to the destruction of documents at Celotex at or about January, 1967?

A. No, I have no recollection of that incident.

Q. Do you have any recollection of anything, any west coast problems in January of 1967?

A. No.

Q. I can't characterize it any further than that.

A. The answer is no.

• • • • •

[6622] CROSS-EXAMINATION

By Mr. MONTGOMERY:

Q. Now, with respect to the verification calls that you have testified that you sometimes made to competitors, isn't it a fact that the number of such calls was very small in proportion to the total number of gypsum sales transactions?

A. Yes, almost infinitesimal.

Q. Did you from time to time have contact with the Celotex legal department when you were there?

Mr. FRICANO. Objection. Outside the scope of direct examination.

Mr. MONTGOMERY. Your Honor, that's a preliminary question.

The COURT. Go ahead.

The WITNESS. Yes.

By Mr. MONTGOMERY:

Q. And who were the lawyers in that department?

Mr. FRICANO. Objection. Outside the scope of direct examination.

The COURT. He says this is preliminary; that he is leading up to something, and I can't tell whether it is until I hear what he is leading up to.

The WITNESS. Mr. Thompson and Mr. Gaudry and a Mr. Adams.

By Mr. MONTGOMERY:

Q. And did you consult with the legal department on [6623] the subject of verification calls with competitors?

Mr. FRICANO. Objection. Outside the scope of direct examination.

Mr. MONTGOMERY. I think it is within the scope, Your Honor.

Mr. FRICANO. Nothing was said about lawyers or whom he consulted with other than Mr. Miller.

The COURT. I am going to let him go ahead. I think that it may be construed to be within the scope.

Go ahead.

The WITNESS. I am sorry. Would you repeat that?

By Mr. MONTGOMERY:

Q. I asked whether you consulted with the legal department with respect to verification calls to competitors.

A. Yes.

Q. And were you advised that such calls were legally permissible?

Mr. FRICANO. Objection. Irrelevant and immaterial.

The COURT. When I suggested that a little earlier, I didn't get any agreement on it, so we will let it go.

Go ahead. You can answer it.

[6624] The WITNESS. I was advised that they were permissible and legal.

The COURT. Now, you remember, ladies and gentlemen, I am going to give you a charge on this matter before you commence

your deliberation, as to what effect, if any, legal advice has or knowledge, or knowledge that something is legal or illegal.

I will tell you how to treat that when we come to the final charge.

* * * * *

[6625] Q. Well, what did the legal department of Celotex tell you about verification calls with competitors?

Mr. FRICANO. Objection. That's going through the back door. Same question; different twist.

Mr. MONTGOMERY. Your Honor, he was asked on direct about instructions he received with reference to making verification calls, if he received instructions as to how to make verification calls.

Mr. FRICANO. If Your Honor please——

Mr. MONTGOMERY. I am entitled to elicit not only what Mr. Miller said to him but what the lawyer asked to him.

Mr. FRICANO. I don't follow that, Your Honor. If my direct examination was limited to Mr. Miller's relationship with Mr. Hill and it was strictly limited to that, I don't see how the lawyers can come into it on cross-examination at all.

The COURT. Well, now, in your offer and in your questioning pursuant thereto didn't you make an offer that you were going to ask about his instructions which he received from a Mr. Armstrong, who was his superior?

Mr. FRICANO. That was Texas Gypsum, Your Honor.

[6626] The COURT. Yes, but that's white horse and black horse.

Go ahead and answer the question. Ask the question.

Mr. MONTGOMERY. Read the pending question, please.

[Question read.]

The COURT. Do you remember?

The WITNESS. I remember the basics of it, Your Honor. They were very explicit in instructing me to limit my conversations to reported competitive situations involving a specific price or situation at a given time at a given place.

The COURT. All right.

The WITNESS. That was pretty much what it was.

The COURT. Now, remember, you will have to take the law from me and not, as I once said before, from Celotex's counsel.

so I will tell you what my view of the law is at the appropriate time.

[6627] By Mr. MONTGOMERY:

Q. And did you follow these instructions of the Legal Department in connection with your verification conversations?

A. Yes, very carefully.

Q. Did they tell you that the purpose of making these calls was to assist the company in complying with the Robinson-Patman Act?

Mr. FRICANO. Objection.

The COURT. Sustained. That has gone far enough now.

* * * * *

RE-DIRECT EXAMINATION

[6635] * * *

Q. * * * Do you remember all those questions that Mr. Montgomery asked you, right at the end?

A. Yes.

Q. And you answered them bam! Just like that, didn't you, "No, sir; no, sir; no, sir."

A. Correct.

Q. Do you mean you have a recollection of that?

A. I know what I don't do.

Q. Oh. Do you know what you do, though, Mr. Hill?

A. Is that a question?

Q. I think there was a great, big exclamation mark at the end of it.

The COURT. Let's make it a question mark.

Mr. FRICANO. Or question mark. I made——

The COURT. It shouldn't be exlamation marks when you ask questions.

Mr. FRICANO. Well, I did this—I meant to say question mark.

The COURT. All right.

[6678] JOHN WILLIAM HOFFMAN

DIRECT EXAMINATION

By Mr. MULLIN:

Q. I believe prior to the recess, sir, you gave your name and address. Do you appear here pursuant to a subpoena?

A. Yes, sir.

Q. Are you currently employed by the Celotex Corporation?

A. Yes, sir.

Q. Would you relate for me, please, your employment with the Celotex Corporation from the time you began up until the time of December, 1973?

A. I started to work for the Celotex Corporation in September of 1948. And I have worked for them continually since then.

Q. And could you tell us what positions you have had with the Celotex Corporation? Just from the period 1960 to 1973, sir.

A. From 1960 to 1973 I was Board Plant Superintendent and Plant Manager. I became Plant Manager from Board Plant Superintendent in 1969.

Q. Which plant of the Celotex Corporation is that, sir?

A. At Port Clinton.

[6679] Q. Port Clinton, Ohio, sir?

A. Yes, sir.

* * * * *

[6687] * * *

By Mr. MULLIN:

Q. And could you tell us who the gypsum companies were that were selling, in the state of Michigan, gypsum board products on pallets at this time?

A. Well, as far as I know, Grand Rapids Gypsum was, and National Gypsum. These are two that I happened to see pallets come into our place with their name on them.

Q. And United States Gypsum?

A. And United States Gypsum.

Q. And how about the Flintkote Company?

A. We shipped for the Flintkote Company.

Q. But—and for the Flintkote Company, you shipped on pallets; is that correct?

[6688] A. Yes, sir.

Q. How about the Georgia-Pacific Corporation?

A. I don't recall specifically seeing any of their pallets in our yard. They might have been.

Q. You mentioned that you were shipping for the Flintkote Corporation. In this board that you made for the Flintkote Corporation, whose label was on the board?

A. Flintkote.

Q. The Flintkote trade name was on the board; is that correct?

A. On the label; yes.

* * * * *

[6702] Q. And do you remember anything about your conversation with Mr. Fischer beyond what appears in Government Exhibit 1774?

A. No, sir.

Q. And there was no mention in that document, was there, of Mr. Fischer telling you anyting about what National Gypsum was going to do about pallets?

A. No, sir.

Q. Did you know at that time that National had already advised its personnel in Detroit or in Michigan it was going to stop shipping on pallets?

A. As far as I can remember, no, sir.

* * * * *

[6714] MARSHALL GODDARD

DIRECT EXAMINATION

* * *

Q. Mr. Goddard, are you retired from the Celotex Corporation?

A. Yes, sir.

Q. And you retired in 1971?

A. June of '71. End of June.

* * * * *

[6716]

By Mr. THORSON:

Q. You were assistant to the Vice-President of Marketing from 1961 until your retirement in 1971?

A. That's correct.

Q. And during that period who was the Vice-President for Marketing?

A. First it was Mr. Greenwood. The title then was Vice-President in Charge of Merchandising. But they later changed it to Vice-President in charge of Marketing. He was followed by Mr. Herbert, I believe in 1969. And Mr. Herbert, I believe, was followed by Mr. Bergen, I think at the end of 1969 or the first part of 1970.

[6719] • • •

Q. Did you have anything to do with the competitive departures from list price?

A. For a time from late '65 to 1967. And in what you might call a clerical and administrative end.

• • • • •

[6722] • • •

By Mr. THORSON:

Q. Do you have Exhibit marked 2124 before you?

[6723] A. Yes, sir.

Q. Was that a document that you reviewed in your work for Celotex since your retirement?

A. I don't recall seeing this particular one.

Q. If you turn to the third sheet in this document, you will see that it appears to be an attachment to the cover document. the third and fourth sheets bear a date of January 11, 1967, and I will ask if you can identify that particular part of this exhibit.

A. In what respect, identify?

Q. Well, have you ever seen that document before?

Do you know who prepared it? Do you know where it came from?

A. The signature is Mr. Gaudry in our legal department.

Q. And to whom was it addressed?

A. Addressed to Mr. Miller in Gypsum Merchandising, sir.

Mr. THORSON. If your Honor please, I would request that those two sheets be marked separately as GX 2414A, and I offer in evidence 2414A.

Mr. MONTGOMERY. Objection to the offer, Your Honor, on the same grounds that I stated earlier this afternoon. Your Honor might take a look at this document.

[6724] The COURT. May I see the document again, please?

Mr. THORSON. If Your Honor please, I am not offering in evidence the cover document, which are the first two pages.

The COURT. Now, you are offering which pages?

Mr. THORSON. The third and fourth pages, Your Honor, and I will offer, too, all the remaining pages of this exhibit, although they have not yet been identified by the witness.

The COURT. All right. I'll admit 2124A.

The CLERK. He said it was 2414A.

The COURT. What number did you give to it?

Mr. THORSON. 2124A.

Mr. MONTGOMERY. What is that exhibit, now?

Mr. THORSON. 24—correction, 2124A consists of all those pages which follow the first two pages of the original exhibit, which I am not offering in evidence.

The COURT. All right. Would you re-mark those and give that one—or keep it, or do whatever [6725] you want with it, but that's not the exhibit. The exhibit is that part that remains.

• • • • •

By Mr. THORSON:

Q. Mr. Goddard, could you look at Exhibit 2124A again, please? And I will ask you whether this document established a procedure for retaining certain documents and allowing for the destruction of certain documents within Celotex.

A. Frankly, I can't answer that fully, because the question of file maintenance was under the office management. We had tons of files around the place, and I am, frankly, personally not acquainted with what our retention records were. I haven't read this in detail as yet.

The COURT. Well, there is no reason, if you aren't familiar with it, why you should. If it becomes pertinent, Mr. Thorson can read it.

By Mr. THORSON:

Q. Were you one of the addresses of this document?

A. I received a copy of it; yes.

Q. And the date of this document is January 11, 1967; is it not?

[6726] A. That is correct.

Q. And is that on or about the time that Celotex and other gypsum companies began experiencing problems on the west coast?

Mr. MONTGOMERY. Objection.

The WITNESS. I don't know about that.

By Mr. THORSON:

Q. You have no knowledge of that?

A. I don't know what problems on the west coast means.

The COURT. I haven't ruled on your objection, because it seems to me the answer makes it unnecessary to rule.

Mr. MONTGOMERY. Well, as long as the record shows that I did object to the question, Your Honor.

The COURT. You objected, and he answered it before I ruled, so—and I don't see any point to ruling now, since the witness says he doesn't know what that's all about.

* * * * *

[6741] Mr. FRICANO. Now, mister what's-his-face here—Mr. Hiering just says that was dishonest.

Let's consider Pennzinger case in 1966. Was United States Gypsum a defendant in that?

Mr. HIERING. It was not, Your Honor, and that was not one of the west coast cases, Your Honor. It was filed in Arizona, Phoenix, before any of the San Francisco cases began, against Kaiser.

Mr. FRICANO. I submit, Your Honor, the most honest way for the jury to consider these facts is to put the facts before them.

Mr. MONTGOMERY. Is that the state of Illinois you are referring to?

Mr. FRICANO. State of Illinois class action.

Mr. MONTGOMERY. My records show, on June 21, 1971, in that case, the complaint was filed against the Celotex Corporation for the first time.

Mr. FRICANO. That is not what your exhibit says. It says, in your own exhibit—I don't understand this. This is beyond me,

Your Honor. Groundless, faceless accusations of an incredible character, gypsum cases, index of complaints, their own exhibit.

Mr. MONTGOMERY. That is a question of who was a Defendant. We were not a Defendant.

* * * * *

[6757] By Mr. THORSON:

Mr. THORSON. Mr. Grainer, could you hand the witness GX-2124-A, please.

[An exhibit is handed to the witness.]

By Mr. THORSON:

Q. Mr. Goddard, do you have GX-2124-A in front of you which begin with a letter dated January 11, 1967, which we identified yesterday; and this is a letter from Mr. Gaudry, who I understand was in the Legal Department of Celotex——

A. That is right.

Q. —and it was addressed to Mr. Miller with copies to you as well as other people within the Celotex organization?

A. Yes, sir.

Q. And this relates to the document retention program for Celotex at that time. And then the following letter was one we last discussed yesterday which was the January 12, 1967, letter from Mr. Hill.

Turn, if you would, to the third page or the third document in this exhibit, and I will ask you whether that document is a form which was customarily used within the Celotex Company.

A. You are referring to this exhibit C that is marked——

Q. It has that marked on the top center of the page. [6758]

A. I believe it was set up by our office management.

Q. Now, this particular page is a printed form with entries typed on it, and the top title reads: "Records disposal authorization."

This one is dated February 14 and has a destruction date in the lower right-hand corner of March 6, 1969, approved by D. W. Miller, and the documents indicated as being destroyed for the year 1964, correspondence, three cartons. The reason for destruction states, "Beyond required retention period."

Turning to the next sheet in this exhibit is another disposal authorization. This one dated January 13, 1970, covers the year 1965, three cartons, reason for destruction, beyond required re-

tention period. That has at the bottom right-hand corner the signed name of D. W. Miller.

Turning to the last page, it is another disposal authorization, and has, as documents indicated as destroyed, 1959 to 1965, gypsum prices, two cartons; January to June, 1965, 350 and 360, three cartons; 1966, Corr., C-o-r-r.—does that stand for correspondence?

A. I would think so.

Q. Four cartons.

1967, correspondence, three cartons; 1968, correspondence, four cartons, with a total of 16 cartons.

[6759] Now, the reason for destruction on this last document is, "No longer needed per D. Miller."

Do you recognize the handwriting on the bottom line of that form?

A. The line "Destruction carried out" you mean?

Q. Yes, sir.

A. No, I do not recognize that.

Q. It is difficult to read on my copy. Can you read it on yours, what it says?

A. It looks like—well, referring back to the second page, it looks like "Building Maintenance," signed by Mr. Squires.

I assume he is one of the janitorial personnel in the building.

Q. Would that be the people who actually did the physical destruction of the documents?

A. I would imagine so.

Q. Now, comparing the language on the last one where it says, "No longer needed per D. Miller" with the previous authorizations, one bearing a date of just a month earlier—the earlier ones said, "Beyond retention period" did they not?

A. Yes, sir.

Q. And if you refer back to the first page of this exhibit, the letter from Mr. Gaudry, it refers to certain [6760] correspondence and his advice that they be kept for at least four years; is that not correct?

Mr. MONTGOMERY. Your Honor, I object to that question. The testimony yesterday was that he is not familiar with these documents, and he didn't know about these procedures.

Mr. THORSON. If Your Honor please, I will just read the document then.

The COURT. All right.

Mr. THORSON. I am reading from the first letter in GX 2124-A, the second paragraph.

> Based on the law which requires us to retain for four years all correspondence and other written data relating to prices, quotes, and bids to customers as it relates to specific jobs or as the correspondence supports information on 350 and 360 Forms, I believe the following files which probably contain such information should be retained for that four-year period.

And then he lists a number of files.

Continuing in the text of Mr. Gaudry's letter——

Mr. MONTGOMERY. Well, Your Honor, I would like to have the entire letter read including that list.

Mr. THORSON. I will be happy to.

[6761] The COURT. We will make it available and the jury can see it at the recess.

Mr. THORSON [continuing]. Mr. Gaudry states:

> You appreciate that I have not thumbed through these files but from the name of the file indicated on your file index it would be my thought that these are the ones which should be retained for four years, but if you know as a fact that other of your files contain information relating to prices or correspondence with our competitors, these files should also be retained for the full four years.

Mr. Gaudry later states:

> You realize that the Legal Department receives a copy of the 350 and 360 Forms which we retained for the four-year period and it will not be necessary for you to keep the Forms but you should keep correspondence, notes, etc., which support the information on the 350 and 360 Forms.

Mr. MONTGOMERY. Your Honor, may I read the paragraph he omitted?

The COURT. Sure.

Mr. MONTGOMERY. "The other files"——

The COURT. That is not the list now, is it?

[6762] Mr. MONTGOMERY. No.

> The other files on your index need not be retained for any particular length of time except as it suits your needs.

By Mr. THORSON:

Q. Now, referring back to the last page, if you would, Mr. Goddard, the last sheet which is the destruction authorization dated February 4, 1970, it states, does it not, that destruction of correspondence was carried out, seven cartons of it for the years 1967 and 1968, which were not only within four years, but 1968 was within two years——

Mr. MONTGOMERY. Objection.

By Mr. THORSON:

Q. —of the destruction date; is that not true?

Mr. MONTGOMERY. Objection. The witness stated he does not know about these documents, and that has previously been read to the jury.

The COURT. Do you know anything about that?

The WITNESS. No, sir. This was in a separate department.

* * * * *

[6767] * * *

Q. In connection with your activities following December, 1965, did you have occasion to have any discussions or conversations with any competitors of Celotex regarding prices for gypsum board?

A. I may have asked as to a specific competitive fact as reported from the field.

Q. You may have? Do you recall that you did?

A. I did very infrequently.

Q. Over what time span?

A. That would have been until no later than October of 1967.

Q. And you say you asked competitors or made inquiries of competitors. Did any inquiries from competitors come in to you?

A. A few.

Q. Do you recall who they were from?

A. I can't say specifically.

Q. What is your best recollection as to who made these calls to you?

A. Oh, I would say it could have been from United States Gypsum or National. Possibly GP. There were very few. Generally I would only receive a call if the merchandise manager or his assistant were out of town.

Mr. DELONE. Move to strike the [6768] answer, since he is saying only what could have been and has made it clear he has no recollection specifically.

The COURT. Do you have a recollection or are you guessing?

The WITNESS. Frankly, I am guessing.

The COURT. The jury will disregard anything that is a guess, of course.

By Mr. THORSON:

Q. Did you mention any calls from Georgia-Pacific?

Mr. MELLOTT. If the Court please, I believe the answer has been stricken and I object to any further questioning along that line. The man has indicated he was guessing completely.

Mr. THORSON. I am sorry.

By Mr. THORSON:

Q. Were the people that called you the same people that you called?

A. I would think so, generally.

Q. Can you recall who you called?

A. A couple come to mind.

Q. Can you name them?

A. Mr. Atwell at National and Mr. Weiser at USG.

Q. Anyone from Georgia-Pacific?

A. I don't recall the name.

Q. At whose direction or under whose instructions did [6769] you make these calls?

A. It wasn't under anyone's instructions. It would have been my own action, depending on the particular circumstances.

Q. Were they done with the knowledge and authorization of your superior?

A. I don't believe that was discussed with my superior.

Q. When you had these conversations, did you have available for your use a Form 350 with respect to the situation under consideration?

A. We would either have had a 350 submitted by the district office or a comparable communication from the district office, a teletype or telephone call saying they ran across certain things.

Q. Did you make any records or notes of any of these calls?

A. At times.

• • • • •

[6773] Q. Do you know whether, on the form 350's that you used, whether there was a space for an entry to record a conversation with a competitor?

A. To the best of my recollection, there was none.

Q. Did you—do you recall whether you made any entries or records on the forms, recording such conversations?

A. I don't recall, really.

• • • • •

[6779] Q. Mr. Goddard, with respect to the notes you made during your conversations with competitors, would it be fair to state that these notes were in support of either forms 350 or forms 360?

A. I would say they were in support of our action on the form.

Q. In connection with the matters which the particular forms 350 or 360 covered?

A. Well, I can only apply a form 350 to a specific case, not a form 360.

Q. And we have seen, from Mr. Gaudry's letter, that his instructions or advice was to retain all such correspondence for the full four-year period. Do you recall that?

A. I believe that is in this. Yes, sir.

[6783] Q. Now, you say your conversations were very infrequent. Is that your testimony?

A. Yes, sir.

Q. And you don't even recall talking with anybody from Georgia-Pacific; do you?

A. I don't recall a specfic instance, yes, sir.

Q. Does that mean your calls with Georgia-Pacific—if you had any—were less frequent than they were with the companies that you do recall having these conversations with?

Mr. MELLOTT. If the Court please, may I have that question re-read. I missed the first part of it.

[6784] [Question read.]

The WITNESS. I would say they were less frequent, yes, sir.

• • • • •

[6785] Q. Mr. Goddard, you testified that you do not remember the telephone calls, but you do remember that they were infrequent?

A. Yes, sir.

Q. When you say infrequent, could you give us some guide or basis as to just what you mean by "infrequent?"

A. Oh, infrequent. I'd say less than one a month.

Q. With each of the companies you had indicated, or with all of them collectively?

A. I'd say it was each.

Q. And as I understand it, these calls were both ways, in and out?

A. That's correct.

[6786] Q. Is that correct?

A. Yes, sir.

• • • • •

[6800] CROSS EXAMINATION

By Mr. MONTGOMERY:

Q. Mr. Goddard, you testified that you infrequently made verification calls and received verification calls with or from competitors while you were at Celotex. You didn't make any of those calls subsequent to August, 1967, did you, with respect to gypsum products?

A. No, sir.

Q. You didn't receive any such calls with respect to gypsum subsequent to that date, did you?

A. No, sir.

Q. Now, you know a Richard Thompson, who was the head of the Celotex Legal Department?

A. Yes, sir.

Q. And how long did you know him in the course of your employment at Celotex?

A. From the time he came with the company, which I think was the early 40's.

Q. You had various conversations with him from time to time in which he gave you legal advice?

A. Many.

[6801] Q. And over that period of time you had many conversations with him in which he gave you legal advice as to the scope and application of the Robinson-Patman Act?

A. That is correct, sir.

Q. And as to the requirements of that Act with respect to not discriminating between different customers?

A. That is correct, yes, sir.

Q. Now, with respect to files of Celotex containing forms 350's and 360's, you were asked some questions on that this morning.

You have reviewed—you know about the existence of those files today, do you not?

A. Yes, sir.

Q. You have been reviewing them?

A. That is correct.

Q. Over the last few months?

A. That is correct.

Q. How far back do those files on Form 350's go?

A. '65 is my recollection.

Q. And there are thousands and thousands of documents——

A. Yes.

Q. —are there not?

A. That is correct.

Q. And those documents, those files not only include the Form 350's themselves, but they include also the various [6802] notes and miscellaneous paper that go with each 350, do they not?

A. Yes, sir.

Q. Now, will you take a look at Government Exhibit 31, please? This is the document which you were asked about that has a second page of paper that you identified as a draft——

A. Yes, sir.

Q. —of a form 350.

A. Yeah.

Q. You didn't prepare that draft, did you?

A. No, sir.

Q. Paragraph 8 says,

> Competitive prices being offered, state exact prices offered and by whom. Name competitors.

That is an item of information that was to appear on the 350, is that correct?

A. That is correct.

Q. Paragraph 9 says,

> What proof or justification do you have to support this information?

After that the next sentence is,

> Name person who furnished competitive information to us and how he received it.

Now that is the customer, is it not?

[6803] A. The first customer, yes.

[6804] Q. Or the individual working at the customer's place of business, who furnished it to our salesman?

A. That is correct. That is the intent of it.

Q. Now, the sentence right after that, in parentheses, follow-that sentence, to name the customer or the employee of the customer, says, "The customer who furnished the information to us and how he received it," says, "E. G. by phone from competitor's office or competitor's salesman."

Now, that language refers to the—to where the customer received the information that he gave to our salesman; does it not?

A. That is the way I would read it; yes, sir.

Q. Thank you. And that is the language that was stricken out, the language that referred to the source of the information that the customer received and then gave to our salesman?

A. Yes, sir.

Q. Not language which talks about any phone conversations between Celotex and any competitor; isn't that correct?

A. That is correct.

Q. Now, throughout your employment with Celotex, did you ever conspire with any competitor to fix or stabilize the prices of gypsum board?

A. No, sir.

[6805] Q. Did you ever agree with any competitor to do that?

A. No, sir.

Q. Did you ever conspire with any competitor to fix or stabilize the credit terms or terms and conditions of sales of gypsum board?

A. No, sir.

Q. To your knowledge, did any employee of Celotex ever do any of those things?

A. I have no such knowledge of that activity.

• • • • •

JAMES F. VAN CLEAVE

DIRECT EXAMINATION

By Mr. FRICANO:

[6846] • • •

Q. Now, did Mr. Armstrong, Sr. whereupon attend the[6847] bi-monthly—semi-annual meetings of the Gypsum Association on a regular basis to your knowledge?

A. He attended many of the meetings. I don't recall whether he attended all of them or not.

Q. Did he indicate to you from time to time that when he went to these meetings that he saw his friends there?

A. I don't recall that he did.

Q. Did he ever indicate to you from time to time, when he returned from Gypsum Association meetings, that he had ascertained prices from his competitors?

A. I don't recall him doing that.

Q. All right, sir.

When he was at a Gypsum Association meeting either in Chicago in or about April, or in some resort area in the fall of the year, did he ever call from that particular location and ask you about a particular price or a particular practice that you may have been engaging in?

A. No, sir.

Q. Did Temple Industries, when it took over, institute the publication of list prices?

A. Temple Industries initially did not. Mr. Bob Weston did, who was their Vice-President of Marketing. And that for some 30 or 45-day interval was in charge of the gypsum operation.

Q. Have you had list prices since that time through [6848] December 23, 1973?

A. Yes.

Q. How do the list prices of Texas Gypsum compare on major products, the staples, the bread and butter items, with those of other major producers?

A. They would compare almost identical, maybe with a few rare exceptions.

Q. Do you have any pricing authority? Or, did you have any pricing authority from the time that Temple took over through December 1973?

A. No, sir.

Q. Who had the pricing authority at Temple in that time frame?

A. Ted Armstrong, Sr.

Q. Is he still with the corporation?

A. Yes, sir. He is semi-retired and has relocated to Temple, Texas. He is in very poor health and he is in an advisory capacity at this time.

Q. Is his son now President of the company or acting as head?

A. He is President.

Q. Ted Armstrong, Jr.?

A. Yes, sir.

Q. To your knowledge, Mr. Van Cleave, did Mr. Huckleberry ever exchange prices with his competitors?

[6849] A. Not to my knowledge.

Q. To your knowledge, Mr. Van Cleave, did Mr. Armstrong, Sr. exchange prices with his competitors?

A. I don't recall that I had any knowledge about him exchanging prices.

Q. Were you ever present at Mr. Armstrong's office when he either made a telephone call to a competitor or obtained a telephone call from a competitor?

A. I was in his office on several occasions when calls were either made or were received.

Q. Did these involve prices?

A. I recall some calls that Mr. Armstrong made in an attempt to verify competitive information that we had picked up in the field, and in order for us to fully determine if this was fact or whether or not it was a false report. He felt that he called on some of the people he knew in the industry to verify our information.

Q. Who were they? Whom did he call, sir?

A. Well, he would call Don Miller of Celotex. And I really don't know who he would talk with with U. S. Gypsum Company. I was not present in these calls, so I just don't really know.

Q. Well, Mr. Van Cleave, weren't you present in Mr. Armstrong's office when he had conversations—as you have described it—verification with Mr. Andy Watt of United [6850] States Gypsum?

Mr. BARTLIT. Objection. Leading.

The COURT. Overruled.

The WITNESS. I don't recall being there when he was talking to Mr. Watt.

By Mr. FRICANO:

Q. Well, did you not testify at page 913 of your Grand Jury testimony on February 1, 1972, in this courthouse, Government Exhibit 5020, as follows, to the following questions:

> Question. Were you aware generally that this was done in the industry, that it was customary?
>
> Answer. I was aware that it was being done, yes.
>
> Question. How were you made aware of this?
>
> Answer. I happened to be present when some of these conversations took place.
>
> Question. And who were the individuals conducting these conversations?
>
> Answer. Well, I recall being present in Mr. Armstrong's office when he has had conversations with Andy Watt of United States Gypsum, Ken Atwell with National Gypsum, Don Miller with [6851] Celotex, Alec McCaskill with Georgia-Pacific, Carl Kessler from Dierks. And I merely recall these conversation, I cannot be specific about them as to what the conversations were, because I don't really remember.
>
> Question. Can you give a general idea of the things that were talked about?
>
> Answer. Yes. In generalities I can. These calls normally were to substantiate our suspicions on information we may have got from the field. And Mr. Armstrong is always not willing to recognize a situation even though the reports are there. And this is my opinion. I think he wants his good friends that he has known for many years to say, 'look, we are doing such and such,' and that kind of helps him make up his mind as to whether or not we can move on with, in many cases, lowering our prices to meet a situation. Quite frankly • • •

> Mr. BARTLIT. Your Honor, I object.
>
> "Quite frankly, we miss a lot of business because we are slow doing this."

By Mr. FRICANO:

Q. Is that your testimony?

A. That's correct.

Q. And is that true today?

[6852] A. Yes, sir, that's true today.

Mr. BARTLIT. Your Honor, I wanted to object to the part about what the witness thought Mr. Armstrong's motives were I think that's improper.

The COURT. The jury will disregard what the witness thought that somebody else thought, what his motives were. The rest of the testimony though, you have heard it.

By Mr. FRICANO:

Q. In addition to the people whom I have just noted, sir, based upon your Grand Jury testimony, I would like to ask you generally: Did Mr. Armstrong from time to time, while you were present, have conversations with any of the other people whom you identified earlier as being his friends? Like Mr. John Brown.

A. Can you be specific as to what the conversation was?

Q. Oh, sure. I am sorry.

With respect to—Well, I say the exchange of prices. The verification process.

A. Well, of course, my knowledge of him verifying these prices, I had that knowledge, but I was not always present in his office when they took place.

Q. I understand that. My question is not that. My question is: Apart from the individuals whom you identified [6853] in your Grand Jury testimony, can you now recall whether there were any others, such as John Brown, Al Meyer of Georgia-Pacific, Mr. Duffy or Mr. Morgan or Mr. Malhiot?

A. I don't recall any other people or conversations.

* * * * *

[6854] Q. Now, from time to time when you made your recommendations on the basis of validity as you have put it, did Mr. Armstrong nevertheless place a call to a competitor?

A. On occasion he would.

Q. Now, from time to time did Mr. Armstrong place a call to a competitor when you had no intention of meeting the competitive situation?

Mr. HIERING. I object to that, Your Honor.

The COURT. Unless he told him he wasn't going to——

The WITNESS. I have no way of knowing what his intentions were there.

By Mr. FRICANO:

[6855] Q. Well, from time to time after you had made a recommendation, and if that recommendation was not to do something, leave it lie as it were, did Mr. Armstrong nevertheless call his competitor?

A. Not that I recall.

Q. Now, do you recall that while you were testifying before the Grand Jury you identified the most recent telephone call that you could recall at that time?

Mr. CORTESE. Your Honor, I object to that.

The COURT. I sustain the objection to that question.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. Now, prior to December 23, 1973, do you recall when the latest conversation was on this verification that Mr. Armstrong, Sr., had?

A. Yes, sir. I testified at the Grand Jury that it was fresh in my mind, that it had only been a few days prior to that testimony that Don Miller had placed a call to Ted Armstrong while I was in his office concerning a sale that we had negotiated with Fox and Jacobs Construction Company in Dallas which is a sizable home builder and that they had prior to that been selling materials to. And he was concerned as if we had made or cut a price [6856] to them and was trying to verify that fact. Ted Armstrong told him we were making no concessions to them, that we were selling at our list prices. And we gathered that Mr. Miller had been at the NAHB Convention which was a few days prior to that and had maybe talked with purchasing people with Fox and Jacobs who normally attend those functions. And that was all the conversation.

The COURT. What was the date of it, and then we will recess for lunch.

Mr. FRICANO. It was January——

The COURT. I asked the witness.

Mr. FRICANO. I am sorry, sir.

By Mr. FRICANO:

Q. What was the date, sir; do you recall?

A. I know it was in January because the NAHB Convention——

The COURT. January of what year?

Mr. FRICANO. I have his Grand Jury testimony to refresh his recollection.

The WITNESS. January of 1972.

• • • • •

[6857]

By Mr. FRICANO:

Q. This morning, Mr. Van Cleve, you testified that it was Mr. Huckleberry that hired you?

A. Yes.

Q. How did you meet Mr. Huckleberry? Did someone introduce you?

A. He was introduced to me by Mr. John Tinsley, who was manager of Rolls Lumber Company in Dallas.

Q. How did it come to be that Mr. Tinsley of Dallas introduced you to Mr. Huckleberry?

A. Mr. Tinsley purchased the first truckload of Texas Gypsum board in the Dallas market and became acquainted with Mr. Huckleberry and I understand Mr. Huckleberry expressed an interest in creating some sales in Dallas and he recommended he talk to me.

Q. That was at the time you were working for Celotex?

[6858] A. That is correct.

Q. Prior to the recess you had just described—when I say described, you had related a telephone conversation between Mr. Armstrong and Mr. Miller of Celotex in January, 1972. Do you recall that?

A. Yes, sir.

Q. Now, Mr. Armstrong, if I recall your testimony correctly—and please correct me if I am wrong. If I mischaracterize it, I don't mean to do so.

Mr. Armstrong, at that time, in reply to Mr. Miller's questions as to whether or not you were offering the lower price said that the Texas Gypsum was not doing so; that they were selling at list or at the market price, is that correct?

A. That is correct.

Q. Was this a typical kind of conversation which Mr. Armstrong had with his competitors?

A. Not typical, in that the call came to him about a certain situation and we just didn't find ourselves in these situations as far as being accused of having lower prices. Normally, the shoe was on the other foot.

Q. When you were accused of having lower prices—excuse me—when you asked others, you know, to account for themselves when they were charging lower prices or deviating from a standard practice, or whatever, did Mr. [6859] Armstrong from time to time seek to obtain information as to why they were doing, if, in fact, it was being done?

A. His interest primarily was to determine if the information we had was a fact; it was valid. Mr. Armstrong—I might add this—being a production oriented individual always felt that for every dolar saved in production, sales would give it away as fast as they would save it, so he was very reluctant to lower prices and it was very hard to convince him that a situation existed from hearsay or because of salesmen reported or in instances I felt it was valid. So to satisfy his own mind he tried to go to the source, and this was always the circumstances that he took this action.

Q. Did he obtain explanations from his competitors when, in fact, they were doing something different?

A. Not always.

Mr. BARTLIT. Objection, lack of first-hand knowledge, no foundation.

The COURT. Of his own knowledge.

By Mr. FRICANO:

Q. To your knowledge, when you were present during his calls.

A. I was only present during a few of them, and not always the information was available to the person he may be talking to. They may have to check and let him know.

[6860] Q. Call him back?

A. Yes, sir.

Q. All right.

Now what risk, if any, would Temple or Texas, as the case may be, the Temple portion of Texas, not the Huckleberry portion, what risk, if any, would Temple Industries take if it did not ascertain if the competitor was actually lowering his price or deviating from list, or what have you?

A. Well, if our information was not correct, then, of course, we could be price discriminating among our customers, which, of course, we didn't want to do.

Q. Anything else?

A. That is it.

Q. Did you not testify at page 920 of your Grand Jury testimony in Government Exhibit 5020 in this courthouse—

Mr. BARTLIT. Objection. I don't think this is proper refreshment.

Mr. FRICANO. I am not refreshing.

The COURT. It sounds like impeachment to me.

The WITNESS. Maybe I didn't understand the question.

By Mr. FRICANO:

Q. Where there any other reasons, other than you [6861] didn't want to discriminate among your competitors, for this information being funneled to Mr. Armstrong?

Mr. BARTLIT. I think Mr. Fricano misspoke himself. He said between your competitors.

Mr. FRICANO. Your customers. Let me——

The WITNESS. Again, if you will rephrase the question——

Mr. FRICANO. I will.

The WITNESS. Maybe I will understand it.

Mr. FRICANO. We will get it on track here.

The WITNESS. All right.

By Mr. FRICANO:

Q. I ask you what risk, if any, you took, if you did not, if Mr. Armstrong did not exchange this information with competitors when there was a report on an alleged deviation.

A. All right, sir.

Q. And your answer was you didn't want to discriminate between your customers, is that correct?

A. That is correct.

Of course, there is one other aspect to this thing, too. We certainly didn't want to be instrumental in lowering our selling price in the marketplace, which is [6862] always been very critical, as far as profitability of our operation. Gypsum was all we had to sell.

Q. And if you lowered your price, what would then happen?

A. Then normally we would create a lower price in the market and other competitors would normally follow. They were very competitive in selling prices.

Q. And the prices would go down?

A. That is correct.

Q. Now, did you ever observe Mr. Armstrong taking any notes when he talked to his competitors over the telephone?

A. I don't recall.

Mr. FRICANO. I have no further direct, Your Honor.

* * * * *

[6863] CROSS EXAMINATION

By Mr. HIERING:

Q. Mr. Van Cleve, you just testified that one of the reasons that you did not want to give a lower price to one of your customers was because you did not want to discriminate; is that not correct?

A. That is one of the reasons, yes.

Q. Is that not in part because you did not want to discriminate to violate the Robinson-Patman Act?

Mr. FRICANO. Objection.

The COURT. You can answer it.

The WITNESS. Yes, sir.

* * * * *

[6877] By Mr. BARTLIT:

Q. Mr. Van Cleave, I understand—I know you will correct me if I misstate your testimony, the same way [6878] Mr. Fricano asked you to correct him—that you—Mr. Armstrong came in in 1965; right?

Q. And that, after he came in, you testified you were present during a few calls he made in his office with regard to this price verification; is that right?

A. Yes.

Q. Now, I thought you said that the usual call was when Mr. Armstrong was calling, rather than receiving a call. Is that a fact?

A. That is correct.

Q. Do you recall any situations where, with regard to these few calls, do you recall any situation other than the Miller call? Do you remember that, that you testified about, in which the call came in to Mr. Armstrong, rather than going out from Mr. Armstrong?

A. I don't recall any other incoming calls.

Q. Now, you said that Mr. Armstrong, when he made these calls, made them in an attempt to verify information from the field. Do you recall that?

A. Yes.

Q. And my notes say that you said it was made to see if the information from the field was fact or a false report.

Now, it is a fact, isn't it, Mr. Van Cleave, that [6879] customers quite frequently gave you misleading or unreliable information on competitive quotes?

A. I can't testify to the frequency. I know it did happen.

Q. Well, let me ask you this question. Do you recall, again, when you testified here before the Grand Jury?

A. Yes.

Q. And do you recall being asked these questions and giving these answers? This is page 918.

Mr. FRICANO. Objection, Your Honor. The witness is not hostile. He hasn't indicated any hostility to Mr. Bartlit.

Mr. BARTLIT. He didn't indicate any hostility to Mr. Fricano, either.

Mr. FRICANO. I can show him the Grand Jury transcript——

Mr. BARTLIT. Your Honor, I object to this.

Mr. FRICANO. Outshouted again.

The COURT. Gentlemen, let us retain our good dispositions.

Now, have you asked him a question that you want to impeach?

Mr. BARTLIT. Yes, sir. Yes, sir.

[6880] The COURT. Go ahead.

By Mr. BARTLIT:

Q. The question at line 6 on page 918, Mr. Van Cleave, is——

The COURT. The answer to which you want to impeach is what I meant to say, not question.

Mr. BARTLIT. Yes, sir. That is right.

By Mr. BARTLIT:

Q.

> Why do you think the customer might give you misleading information or unreliable information?
>
> Answer: "They quite frequently do this. It becomes a game with many of your larger dealers who buy large quantities of gypsum. They will weigh one producer against another, and if they can get you to believe that they have got a better price from a competitor, this may accomplish what they are after, and all these dealers are looking for an edge in the marketplace.

Did you so testify, Mr. Van Cleave?

A. I did.

Q. And was that the truth?

A. Yes, sir. That's the truth.

Q. Now, finally, when you were asked about the reasons why these calls were made by Mr. Armstrong. I believe you said that you didn't want to discriminate, and then you [6881] mentioned the Robinson-Patman Act. Do you recall that?

A. Yes.

Q. Now, did you understand, Mr. Van Cleave, that the Robinson-Patman Act allowed you to give a lower price to a particular customer if you were meeting a lower competitive quote?

Mr. FRICANO. Objection.

Mr. BARTLIT. That's per his understanding, Your Honor.

Mr. FRICANO. Objection.

The COURT. Well, you can answer that. The jury will understand that this gentleman is not a lawyer, and what the meaning of the Robinson-Patman Act is, and its effect, you don't take from the witness.

Mr. BARTLIT. Your Honor—and I will make it clear that my question is not designed to find out what the law is, but to find out this witness' understanding.

The COURT. You can ask his impression and that's all.

The WITNESS. My understanding is that we would have to substantiate that evidence or perhaps have this customer acknowledge in writing the fact that this was presented to him, and have some form of evidence other than verbal.

[6882] By Mr. BARTLIT:

Q. And these calls were made, then—one of the reasons why these calls were made was if you couldn't verify or substantiate it from the customer, you were going to do it another way; is that right?

A. Yes, sir.

Q. So that wasn't it your understanding that, under these certain circumstances we have described, where, making these calls—Mr. Armstrong making these calls to his competitors allowed him to drop the price or cut the price to the customer?

A. I can only answer that it allowed him to make his decision, of course, which was his to make.

Q. But you did just say that it was your understanding of the law that, if you had verification of the lower competitive price, why, then you could drop your price down to meet that; right?

Mr. FRICANO. Objection. He is arguing with the witness.

Mr. BARTLIT. No, sir.

The COURT. Well, if he is arguing—go ahead. Can you answer the question?

The WITNESS. Well, I stated my understanding—are you repeating the question?

Mr. BARTLIT. Well, would you read the [6883] question back, please?

The COURT. Maybe—Mr. Bartlit is trying to rephrase your opinion, I guess.

Mr. FRICANO. I also object to the form of the question.

The COURT. Read the question back, please.

Mr. BARTLIT. I will rephrase it. I think I can shorten it up.

By Mr. BARTLIT:

Q. Mr. Van Cleave, wasn't it your understanding that, under the certain circumstances which you have described, these calls to verify prices with competitors by Mr. Armstrong would, under the law, allow you to drop your price to meet that lower competitive quote?

Mr. FRICANO. Objection. It is also reptitious.

The COURT. Well, you can say whether or not that's your impression.

I read the Robinson-Patman Act to the jury, and it doesn't say anything about any telephone calls, but go ahead.

The WITNESS. Well, again, I don't know what extremes you can go to to validate a report, other than something documenary or an invoice or, if the information [6884] you have is not sufficient to make up your mind, then I would guess that it would be up to the individual to determine whether the phone call was in order.

I can't answer for Mr. Armstrong.

Q. But, from your knowledge of it, of these phone calls—and I agree that's all you can testify to——

Mr. FRICANO. Objection to what Mr. Bartlit agrees to or what he doesn't agree to.

Mr. BARTLET. Your Honor——

The COURT. All right, now, gentlemen, please.

Mr. BARTLIT. Well, let me go about it this way.

By Mr. BARTLIT:

Q. You have testified that, frequently, you got misleading or unreliable information from customers; right?

A. Yes.

Q. And one of the reasons why these calls were made was to check out that misleading or unreliable information to see if, in fact, there was a lower quote in the marketplace; right?

A. Yes, sir.

The COURT. Now, I am going to read the Robinson-Putnam Act, as it is relevant, again, so that the jury will know what it does say.

[6885] Section 2(a) of the Robinson-Patman Act. This is not—I am telling you what it says, rather than reading the act. It prohibits direct or indirect discrimination by a seller in price or other conditions or terms of sale if the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce for to injure, destroy, or prevent competition.

However, Section 2(b) of the act grants the seller a complete defense to a price discrimination charge where he extends a lower price in good faith to meet a lower price of a competitor.

That's what the provision says.

Is there any disagreement by anybody as to my interpretation of 2(a) of the Robinson-Patman Act?

Mr. FRICANO. Not on behalf of the United States, Your Honor.

Mr. BARTLIT. There is no disagreement with that, Your Honor. The issue of good faith goes beyond that, I think. The Court, I am sure, will instruct the jury on that.

The COURT. At the appropriate time.

Mr. MELLOTT. If the Court please, the only objection I have is that there are other provisions, which I am sure Your Honor will cover at a later date, of other instances in which the seller can grant a lower price [6886] to certain customers.

The COURT. Well, yes, but that's not relevant right now. That's not what we are talking about here at all, and that would just confuse things if I brought that up at this moment.

Mr. MELLOTT. I understand.

Mr. BARTLIT. That was my point, Your Honor.

The COURT. What we are talking about now is the business of this price verification, its relationship to the Robinson-Patman Act, and I have defined to the jury the appropriate provision of that act.

By Mr. BARTLIT:

Q. Then, finally, Mr. Van Cleave, if you were dealing with a customer, and you thought the information might be misleading or unreliable, why, you couldn't, in your own mind, in good faith, think that the customer had a lower competitive quote; could you?

A. That is correct.

* * * * *

[6894] RE-CROSS-EXAMINATION

The COURT. Did you have a feeling that you had to do something else? That is what Mr. Bartlit wants to know.

Mr. BARTLIT. That's not my question, Your Honor.

The COURT. What is your question?

Mr. BARTLIT. My question is that if you, Mr. Van Cleve, if you wanted to substantiate the customer had a lower price than somebody else's, right, and he was the kind of customer that for one reason or another you felt he might be misleading you, why you had to substantiate that some other way than asking the customer, didn't you?

The WITNESS. Yes.

* * * * *

[6932] * * *

EDWARD PAPPERT

CROSS EXAMINATION

By Mr. HIERING:

Q. Mr. Pappert, could you tell us whose idea it was to write, for Mr. Rydlund to write letters to your competitors to get your pallets back?

A. Yes, sir, it was mine.

Q. And these—

A. These letters were composed in Chicago under my direction and sent to Mr. Rydlund and we asked him to send them out.

Q. Why did you want to get your pallets back?

A. The pallets were worth $12.50 a piece. We have lots of them in the marketplace and we have no desire to supply pallets to our competitors. Further, we had some use for the pallets in our own plant.

* * * * *

[6942] * * *

Mr. BARTLIT. Yes, sir. I have a motion, Your Honor, and that motion is for a mistrial. The grounds of my motion are this:

That Mr. Fricano pointed out to Mr. Pappert that the May 18, 1971 memo was a memorandum relating to Mr. Pappert's decision. He then asked Mr. Pappert—and I don't have the transcript, but my notes indicate that he asked him to the effect of whether Mr. Watt said anything to Mr. Pappert about a discussion on getting rid of pallets at the April Gypsum Association meeting which shortly preceded May 18.

Now, Your Honor, I know of no evidence of such discussion at that meeting.

In the offer of proof, Mr. Fricano noted that he was intending on drawing this kind of inference and making this kind of argument. I noted, Your Honor, that this kind of inference is not warranted. Moreover, that this was a repetition of the same tactic of asking a witness who has no knowledge about something that he doesn't know anything about. And it is aggravated in this case because there isn't any evidence that I know in the record on that.

Your Honor, because of the circumstances under which this arose, because of the prior discussion and the [6943] offer of proof, I can only conclude that this was an intentional effort to get prejudice into the record.

And I say, Your Honor, that in a case like this, if the Government has a case they ought to prove it. They shouldn't have to stoop to that sort of thing. And I move for a mistrial on that basis.

The COURT. All right. Motion is denied.

* * * * *

[6950] FREDERICK A. WAGNER, called as a witness by and on behalf of the Government, having been first duly sworn was examined and testified as follows:

* * * * *

[6956] * * *

Q. Now, this is a memo from Mr. Shea to Mr. Colon Brown and yourself, among others; is is not?

A. Yes.

Q. And it is dated August 5, 1965?

A. Yes.

Q. It is also directed to Mr. Nicely. Do you see that?

A. Yes.

Q. Now, there is some handwriting at the top of that document; is there not?

[6957] A. Yes.

Q. Do you know whose that is?

A. Yes.

Q. Whose is it?

A. Mr. Colon Brown's.

Q. Now, the subject of this memorandum is, "Modification in Discount Policy," is it not?

A. Yes.

Q. Do you know how Mr. Shea came to write this memorandum?

A. Yes, I believe I do. Mr. Shea was an accountant in the department that we called our comptroller's department. These were plant cost control accountants, primarily, and these men had the responsibility for plants, to study plant operations and determine the problems that were existing in the various cost elements that were involved at a particular plant location, and Mr. Shea, in studying this, apparently came to the conclusion that he should write this memorandum as a method by which he might level peak loads that cause overtime at the plant level.

Q. Now, Mr. Brown, in the handwriting at the top of the page that you have identified, states, FAW and FAM. Do you know whose initials they are?

A. FAM would be Mr. Manske.

Q. And FAW?

[6958] A. Me.

Q. "FAW and FAM should interest theselves to a proper conclusion based upon an objective analysis. If this is costing profits, then let's act."

You will notice there is some handwriting at the bottom of the page. Can you identify that?

A. Yes, that is my handwriting.

Q. And you state you are sending your copy to EEW for recommendations. Who is EEW?

A. This was Mr. Williams.

Q. He was the treasurer?

A. Yes.

Q. He had the general credit manager underneath him?

A. That is correct.

* * * * *

[6965] Q. Who was the senior vice president of sales at this time?

A. Mr. John Brown.

The COURT. Now, if you want to know what his primary responsibility was, you can ask the witness. You just can't state it.

Mr. SCHMOLL. O.K.

By Mr. SCHMOLL:

Q. Now, Mr. John Brown had extensive experience in the industry and knew a lot of people, did he not?

A. Mr. John Brown to my knowledge had been in our sales organization, National Gypsum Company, for a long period of time.

Q. And Mr. Colon Brown does state in this memorandum, does he not, that the senior vice president of sales whose function is one primarily directed to industry relationships?

A. Yes, those are the words that you read.

Q. Now, Mr. John Brown represented National Gypsum Company at the Gypsum Association meetings, did he not?

A. I believe that he was a member of the Gypsum [6966] Association. I do not know to what extent he attended meetings.

Q. To your knowledge did Mr. Brown contact his competitors with respect to matters of competitive concern?

A. Not to my knowledge.

Q. Now, what competition was doing with respect to cash discount terms was a factor to consider with respect to this proposal of Mr. Shea's, was it not?

A. Yes.

Q. Now, when Mr. Colon Brown in his memorandum refers to Parent Company top management, that would be Mr. Brown himself, would it not?

A. Yes.

* * * * *

[6972] "A meeting was held in Mr. Manske's office on September 3 to discuss the subject matter of oyur memorandum dated August 30. Attending were Mr. Manske, Mr. John Brown, Mr. Jay Nicely, Mr. L. L. Hank and F. A. Wagner.

This does not mean that they are not significant to any particular segment of our economy. It was just my opinion that while we were considering in a broad brush approach that question of discounts, that that was one that ought to be brought in, and I so expressed it.

[6976] Q. Well, who raised the point about the fact that some years ago United State Gypsum had attempted to eliminate discounts, and that even though it was generally agreed among the industry producers on the West Coast, the proposal had failed?

A. I don't know who raised it.

Q. Did you raise it?

A. No, sir.

Q. Did Mr. Jay Nicely raise it?

A. I do not know.

Q. John Brown?

A. I don't know.

Q. Did you discuss what could be done to prevent such a failure from happening again?

A. No, sir.

Q. Was your Credit Department in touch with competition at this time?

A. I don't——

Q. I will rephrase the question. Were individuals within your Credit Department in telephonic or face-to-face contact with officials in competing Credit Departments?

A. They communicated with Credit Departments, other Credit Department people, to see what their credit experience has been.

Q. Did they communicate with them with respect to [6977] matters of competitive concern, such as the elimination of discounts?

A. No, sir. That was something we had under consideration as to what we might decide to do with it.

Q. Did they communicate with them concerning departures or deviations from published credit terms?

A. Not to my knowledge.

Q. Mr. Wagner, there is evidence in this case that certain individuals in National Gypsum Company were in communication with individuals at competitor companies with respect to these matters. Were you unaware of this?

It was clearly evident from this meeting that much savings could be made in the Operations Department if we could develop some basis for eliminating the peak load between the 25th and the end of the month.

One of the suggestions that was developed was that we consider the discount in terms of a per unit basis, rather than as a percentage of the invoice. This would conform the Gypsum industry to the Lime industry, where our discount terms are 25 cent a ton. We would have a discount stated in terms of so much per thousand square feet, etc.

This matter is going to be pursued to see whether any other reforms can be incorporated merely because this gives us an opportunity to be talking about discount terms at the same time we are talking about method of computing discount.

Another suggestion went to the problem of discontinuing discounts entirely. This has some practicability by reason of the fact that such a large proportion of our sales are currently being handled [6973] on "Special Terms."

[6975] Q. Now, Mr. Wagner, you had earlier reported to Mr. Colon Brown that the proposal that had first started out by, was first developed by Mr. Shea, was not realistic.

And now you state in your memorandum that you felt that industry-wise there would never be a better time to eliminate the discount. Does that represent a change in attitude?

A. Mr. Shea's recommendation was related entirely to eliminating peaks and valleys. This particular thought that is reflected in the memorandum that you just read was entirely a suggestion that I personally made at the meeting.

Now, as I explained, I am finance oriented. I am not sales or credit oriented basically. Finance is my field. I was aware—because I am also responsible for paying the bills that come to National Gypsum Company—I was aware of the fact that many of these vendors from whom we buy supplies and products were eliminating discounts entirely.

From an accountant's point of view, discounts are just some unnecessary bookkeeping process. I will make it that blunt.

Mr. DeLone. Object to the form of that question if we are talking 1965, these matters. I don't know what Mr. Schmoll is referring to. It is entirely too broad, and I think it may well be a misstatement of the record.

The Court. Well, I am going to sustain the objection. You can ask him whether he was aware whether such a thing occurred, but you can't ask him whether somebody else's testimony is correct or not.

By Mr. Schmoll:

Q. Now, on the top of Government Exhibit 904, the memorandum which was just read, there is some handwriting. Do you know whose handwriting that is?

A. I believe it is mine.

[6978] Q. And you state—do you not—"John Brown has EEW study about two weeks ago."

A. That's what the note says.

Q. Now, you state at the very end of your memorandum that a further report would be prepared. Did you do anything further with respect to this question of possible elimination of discounts?

A. I don't recall that there was any supplemental report.

Q. Did you continue—you, John Brown, Jay Nicely, and others at National Gypsum Company—continue to engage in studies of the problem?

A. Yes, sir.

* * * * *

[6984] Q. Referring now, to 905, is that document a part of the continuing studies that were taking place after your meeting in Mr. Manske's office?

A. Yes.

* * * * *

[6985] Q. Did Mr. Colon Brown continue to take an interest in the credit and cash discount problem?

A. Well, he had initiated the effort that we were pursuing, and, obviousy, he had a continuing interest as to how it might be disposed of.

* * * * *

Mr. Schmoll: Mr. Grainer, would you [6986] hand the witness Government Exhibit 908?

By Mr. Schmoll:

Q. Mr. Wagner, this exhibit is in evidence, and it is a memorandum from Mr. Colon Brown to you; is it not?

A. Yes.

Q. Do you recall receiving this document?

A. Yes.

Mr. Schmoll. With the Court's permission, I would like to read the first three paragraphs of this document.

Mr. DeLone. The document has already been read in full to the jury once, sir.

The Court. Oh, all right, then, don't read it again.

The jury can look at it.

By Mr. Schmoll:

Q. Now, Mr. Brown, in this memorandum, directs you to take certain action; does he not?

A. Yes.

Q. Did you take any action in response to this directive?

A. Yes.

Q. What did you do?

A. I discussed this with Mr. Williams, and the conclusion was reached that we would prepare and continue to study this matter and prepare various alternatives that we [6987] felt were available to us, so that, if a decision were to be finalized, it could be implemented without any delay.

Q. Now, do you know whether or not—I will withdraw that. What's the date of that document?

A. December 10, 1965.

Q. Do you know whether or not, on the date of that document, Mr. Colon Brown met with any competitor?

A. Not to my knowledge.

Q. Do you know whether or not, on the date of that document, Mr. John Brown met with any competitor?

A. I do not.

Q. Or had any telephone conversation with any competitor?

A. I do not.

* * * * *

[7017] By Mr. DeLone:

Q. You made some reference, in the course of your testimony, I thought, to studies of this credit problem by Mr. John Brown, or and Mr. Nicely. Are you aware of whether Mr. John Brown or Mr. Nicely, themselves, initiated or prepared any proposals or studies in that sense, about the possible—about how to deal with this credit problem in 1965?

A. I do not recall that they themselves ever made any studies.

[7018] Q. They did, I take it, consider studies that were prepared by others?

A. Others.

Q. Now, there was reference here, this morning, to a memorandum Mr. Brown sent to you on December 10, 1965, with reference to this credit situation, if we might call it that, or sales terms. Did Mr. Colon Brown, when he sent you that memorandum, give you any specific instructions about what change was to be adopted?

A. No specific instructions.

Q. And had any change been determined on, by that time, by the top management of the company?

A. No, sir.

Q. Any particular change?

A. No, sir.

* * * * *

[7022] * * *

Q. Will you look first at National Gypsum Exhibit 45, Mr. Wagner, and tell me what that deals with?

A. The subject is, "Terms of Sale, Gypsum Products," and it deals with the result of a study as to what the discount could reasonably be expected to produce on a weight basis.

Q. And it is from Mr. Williams to Mr. Brown, with copies to others, dated January 10, 1966?

A. That is correct.

* * * * *

[7023] Q. And would you look also at National Gypsum Exhibit 44. Is that a memorandum from Mr. Barber to Mr. Williams of October 14, 1965?

A. Yes, it is.

* * * * *

[7026] * * *

Mr. DeLone. May the witness have National Exhibit 77.

By Mr. DeLone:

Q. Do you have that before you, Mr. Wagner?

A. Yes, I do.

Q. That's a statement of policy of antitrust law compliance, and it shows on the face, "Approved, F. A. Wagner." Do you see your signature on there?

A. Yes.

Q. With an issue date of December 1, 1967?

A. Yes.

Q. Is that after you became Vice President, Administration?

A. Yes.

Q. And did you prepare this document?

A. No, I did not.

Q. Do you know how it came to be prepared?

A. I believe it came through our house legal counsel.

Q. Who is your house legal counsel?

A. Mr. Ralph Kreinheder.

Mr. Schmoll. Objection, Your Honor. [7027] I believe that that line of interrogation is outside the scope of direct examination.

Mr. DeLone. I think it is, sir. The document is already in evidence. I'd like to, if I could. It won't take long, and it would save Mr. Wagner from making another trip. But I agree it exceeds the scope of direct examination.

The Court. You may proceed. He is your witness.

Mr. DeLone. Thank you, sir.

The Court. In other words, as of direct examination.

Mr. DeLone. Yes.

I wonder if I might have the last answer.

[Last answer read.]

By Mr. DeLone:

Q. When you say "house counsel" I take it you mean a lawyer in the full-time employ of National Gypsum Company?

A. That is correct.

Q. And did Mr. Kreinheder report to you during this period 1967?

A. I believe so.

Q. Did you exercise any direct supervision of this carrying out of his functions as corporate, inside corporate counsel?

[7028] A. Yes.

Q. In terms of his legal opinions, or how?

A. Well, basically Mr. Kreinheder had been legal counsel in the Building Products Division. And for a number of years this was his primary responsibility. And, structure-wise, he reported to me, I believe, at the time in 1967.

Q. Was this one of a series of policy statements issued by your office after you became Vice President, Administration?

A. Yes. My office was responsible for an effort that we had begun to document all our policies and procedures. And this was the standardized form. And this was the official method.

And when my office applied my approval signature, this was an official documentation of what the policy was.

Q. And at whose instigation did you in your office begin to codify this series of policy statements?

A. This was one of the changes that was instituted by Mr. Colon Brown.

Q. After he became Chairman of the Board?

A. Yes.

Q. Do you know whether in this instance, with reference to GX 77, whether Mr. Kreinheder authored the document or whether he had any assistance in connection with [7029] it?

If I said Gx 77, I meant National 77.

Do you know whether Mr. Kreinheder authored the document or whether he had assistance from anyone else in that regard?

A. I do not.

Q. Now, if you will look at page 8. You will see that there are two page 8's, Mr. Wagner, one with an issue date 12/1/67, and one with an issue date 1969. Do you see that?

A. Yes.

Q. I should have asked you first—I am placing on the table, on the witness box, National Gypsum Exhibits 40, 41, and 42. Would you tell me what National Gypsum Exhibit 40 is, Mr. Wagner, just in brief?

A. This was the distribution internally of the procedure on antitrust compliance.

Q. That's the document which is National Exhibit 77?

A. National Gypsum 40.

Q. No. But the procedure on antitrust compliance is National Gypsum 77?

A. Yes. Yes, that is correct.

Q. So that by reference to National Gypsum 40 one can determine who received or to whom the——

[7030] A. Copies were issued.

Q. Right. And that bears date January 5, 1968?

A. Yes.

Mr. DeLone. I offer in evidence National Gypsum Exhibit 40.

Mr. Schmoll. No objection.

The Court. Admitted.

[Defendant National Gypsum Exhibit 40 was received in evidence.]

By Mr. DeLone:

Q. And I had called your attention to the fact that there are two page 8's, one with an issue date of 12/1/67, and one with an issue date 1969.

In that regard, do you know how it came about that a new page, substitute page, was issued over your signature in 1969?

A. It was probably brought to my attention again through our legal counsel that this change was in order.

Q. Will you look at National Exhibit 41 and tell us what that is?

A. From this I see that it was Mr. Hayes who advised my——

Q. Just tell us what it is first. The document [7031] isn't in evidence. The memorandum from Mr. Hayes to you.

A. Memorandum from Hayes to me.

Q. December 17, 1969?

A. Yes.

Mr. DeLone. I offer in evidence National Exhibit 41.

Mr. Schmoll. No objection.

The Court. It is admitted.

[Defendant National Gypsum Exhibit 41 was received in evidence.]

By Mr. DeLone:

Q. Would you tell us what that is then? You started to.

A. Yes. Mr. Hayes, through this memorandum, brought to my attention a need for change in our published procedure. And this was brought about in the change in the page of the procedure so that our method of changing procedure was to reissue that section of the procedure which was being changed.

* * * * *

[7042] * * *

RICHARD L. DOWNING, called as a witness, having been first duly sworn, was examined and testified as follows:

The Clerk. Would you give your name to the Court, sir?

The Witness. Richard Lawrence Downing.

DIRECT EXAMINATION

By Mr. Fricano:

Q. Would you state your residence address, please, Mr. Downing.

A. I live in Virginia City, Nevada.

Q. By whom are you employed, sir?

A. I am not employed at the present time.

Q. Were you ever an employee of the Kaiser——

Mr. DeLone. I asked for an offer.

The Court. Go ahead.

Mr. DeLone. At the appropriate time. I don't want to interrupt the preliminaries. I would like to ask for an offer of proof.

The Court. Yes, as soon as he is identified.

Mr. DeLone. Very well. I wasn't sure. I thought he was going on, sir. Sometimes they get ahead of you.

Mr. Fricano. I hope so.

By Mr. Fricano:

Q. Were you, at one time, employed by the Kaiser Gypsum Company?

A. Yes, I was.

* * * * *

DISCUSSION

[7045] Mr. Fricano. If Your Honor please, thank you. I will proceed with the offer of proof.

* * * * *

[7050] Mr. Fricano. He will also testify, based upon his personal experience as a credit man, that a one percent penalty had never before been contemplated by any manufacturer—at least by Kaiser Gypsum Company. He had never heard of any. Nor has he heard of any since.

He will testify that in an attempt to get extended terms—that is, to be allowed to continue to have some financing, as they viewed it, by manufacturers, Mr. Downing went first to Flintkote immediately before the March 1, 1966 terms were to go into effect and worked a deal with Flintkote.

He then went to get extended terms. They then went to other corporations, National and Flintkote, in a similar attempt, but somebody caught up with him and called Mr. Moran of Flintkote, whom he worked a deal with, which Mr. Moran told him over the telephone, "All bets are off. I must renege, because I can't face my competitors."

As a consequence, between the price increase and the removal of discounts on prices, and his inability to get extended terms, he was driven out of business, as were many other dealers. Mr. Downing was a plaintiff in the Wallboard Products Case. He made a recovery.

The Court. You don't propose to show that; do you?

Mr. Fricano. No. It is just background [7051] for the Court, that's all, Your Honor.

The Court. All right.

Mr. Fricano. He was a recipient of a Robinson-Patman Act violation. When he went into business with Kaiser he left as General Credit Manager with the understanding that he would start a dealership, and the majority of the board product that he would buy would come from Kaiser Gypsum, but only with a special deal. He got the best deal going in the marketplace at that time, and for a period of time he got it, which was a

dollar to a dollar and a half to two dollars off a thousand, plus terms of 60, 90, 120 days.

But this was not to meet a competitive situation. This was directly to Mr. Downing when he started his business. And he will testify that others, other dealers were not receiving that same deal.

The COURT. Well, how is that relevant to this trial?

Mr. FRICANO. It is not.

The COURT. It is not? Well, then we will forget it.

Mr. FRICANO. Well, if Your Honor please though, it is my understanding that the defendants' case is going to involve the calling of lawyers.

The COURT. I have no idea what the [7052] defendants' case is. But how would it be relevant in this case that this man entered into a relationship which may have been a violation of the Robinson-Patman Act by a company which is not here at trial? I know that they were named as a possible co-conspirator.

Mr. FRICANO. No. They were defendants, Your Honor.

The COURT. Yes. But they must have been a co-conspirator?

Mr. FRICANO. Oh, yes. Yes, Your Honor.

The COURT. But they are not on trial here. We are not trying a Robinson-Patman violation. It is not part of the conspiracy charged.

Mr. FRICANO. Yes, Your Honor, that's correct.

[7053] The COURT. I will permit the evidence to be put in unless somebody objects.

Mr. FRICANO. Well, I can at least show the reasons to understandings without characterizing the understandings. At least show what arrangements Mr. Downing made with Kaiser when he left, and without more——

The COURT. I don't know why, but I will——

Mr. DELONE. Well, Mr. Fricano hasn't finished his offer, I take it, sir. We are going to have considerable objection.

The COURT. I just couldn't understand that one.

Mr. DELONE. I will object now to make sure that we don't forget.

* * * * *

[7057] Mr. HIERING. Here is the problem. I can only do this by way of illustration, Your Honor.

One of the subjects of testimony in the past has been a meeting between three men from Kaiser and a man from Flintkote where they had a 13-hour drinking bout, and in the course of that they flipped a coin as to who was to buy Union Gypsum Company. One of them lost. Neither one ever did buy Union Gypsum Company. Nothing ever came of it.

Mr. FRICANO. I am not going into that, Your Honor, so Mr. Hiering can just forget about that one.

Mr. HIERING. That's all right, Your Honor. But the problem is, I can't tell.

The COURT. You are not raising an objection to the offer. What you are raising an objection to is a specific matter which I will rule on, and I will rule on if it comes up.

Mr. HIERING. The problem is, we don't know what is coming up with this general offer.

The COURT. Well, I didn't interpret the offer to be so general, but go ahead.

Mr. HIERING. All right, Your Honor.

Now, Mr. Fricano says that he is going to prove by this witness how the conspiracy affected him. And we would object to that, Your Honor, on the grounds of [7058] relevance. It is inflammatory, prejudicial to the Defendants.

We tried the issue of how this alleged conspiracy affected this witness in his business for three months in the West Coast cases, and it was decided in the Defendant's favor, Your Honor, that the actions of the Defendants did not put him out of business. And Mr. Fricano apparently is going to re-raise that.

The COURT. You mean some jury in California or on the West Coast so decided; is that right?

Mr. HIERING. Yes, Your Honor.

The COURT. My simple answer to that is: "So what?"

Mr. HIERING. Well, the point is, it has no materiality here, Your Honor.

The COURT. That's something else again. The fact that a jury in California reached one kind of a decision has nothing to do with our case.

Mr. HIERING. I raise that only . . .

The COURT. I know why you are raising it, but I will tell you it has no bearing.

Mr. HIERING. Yes, Your Honor. We object to that because of its irrelevance and lack of materiality to any issues in this case.

[7059] The COURT. What do you contend the relevancy of such testimony is?

Mr. FRICANO. What happened to him, once extended terms went out—well, for the stabilizing effect to the market?

The earlier testimony in this record, already in, was that the companies were contemplating the very thing that happened to Mr. Downing, if they, in fact, tightened up on the credit terms, it means some dealer is going to have to fall by the wayside. Here is the living, breathing proof of it, right here. That is already in the record.

The COURT. I don't understand how that shows any stabilization of prices.

Mr. FRICANO. People like Mr. Downing were getting the price exceptions. When these price exceptions went out of the market and the stabilizing effect came in, and they couldn't pay their bills because of the financing situation, they went out of business.

Extended terms were part of the competition, Your Honor.

Mr. HIERING. Well, Your Honor, they could put in evidence as to the withdrawal of terms, but, as to what effect it had on this witness that is irrelevant to this case.

[7060] The COURT. That is the thing that is bothering me. You could certainly show they took away extended terms, but, whether the removal of extended terms put this man out of business, how is that relevant?

Mr. FRICANO. That is one of the purposes of the agreement.

The COURT. To put people out of business?

Mr. FRICANO. I think so.

The COURT. Is that in any way charged in this indictment?

Mr. HIERING. No, Your Honor.

The COURT. I would sustain the objection to that part of it, the effect of it on this individual.

Mr. HIERING. Now, with regard to the alleged receipt of the Robinson-Patman violation, we do object to that, Your Honor.

The COURT. I sustain the objection to that.

• • • • •

[7068] RICHARD LAWRENCE DOWNING

DIRECT EXAMINATION (RESUMED)

By Mr. FRICANO:

Q. Would you please briefly as you can, tell us what jobs you held with Kaiser Gypsum during that time frame, and years within that time frame that you held each job.

A. In 1954 I was employed as District Credit Manager working out of Seattle, Washington, covering the Pacific Northwest states.

In January, 1956, I was moved to Southern California [7069] as a District Credit Manager covering the Southwestern states.

In 1962 I was moved to Oakland as General Credit Manager covering the entire company operation.

Q. How long did you hold that job?

A. One year.

Q. What happened after June of 1963?

A. I quit Kaiser at that time and went into business as a gypsum wallboard dealer.

Q. Where?

A. In the San Francisco Bay area.

Q. What was the name of your dealership?

A. One was Wall Products Company. The other was Rainier Enterprises.

Q. During your employment with—I will limit myself in my questions to a tighter time frame.

From 1956 through June of 1963, when you held various different jobs, did you from time to time contact your counterparts at competitor companies and exchange and discuss with them credit information?

A. Yes, I did.

Q. What kind of credit information did you discuss with them ?

A. Discussed everything that applied to any customer relative to their financial status and ability to pay bills and their sales or purchases from our company and the other [7070] companies.

Q. Did you ever discuss with your competitors extended terms?

A. Yes, as they were applied to the customer.

Q. What was the nature of your discussions with respect to these matters with your competitors? Why did you do it?

A. Well, it was a basis for making a decision as to what Kaiser would do in regard to that customer and the same was true of the other party in the discussion. It was the basis for their knowing what to do.

Q. Were these conversations abrupt and limited?

A. No.

Q. What form did they take?

A. They took several forms. Frequently telephone conversations, frequently meetings in coffee shops or lunch dates, luncheon meetings.

We also had a regular monthly meeting that was held under the auspices of the Credit Reporting Association. We met monthly and these were luncheon meetings.

Q. Of what importance were the terms and conditions of sale, or more specifically, extended terms, to a dealer?

A. In the gypsum industry, without extended terms, a dealer generally did not exist. Private financing was seldom, if ever, available to gypsum dealers.

[7071] Q. Why not?

A. The gross margins and the profit margins in the dealer business were so small that a normal investor would not put their money in this kind of business.

Q. Who did?

A. The gypsum companies did through the form of extended credit.

Q. Did it allow a customer, dealer, a longer period of time to pay his bills?

A. That is what I meant by extended credit.

Q. Did you, in these conversations and discussions that you had with your competitors, also talk about the 2% cash discount?

A. All during the time I was employed by Kaiser, the 2% cash discount did exist as a standard term of sale. What we did discuss was the application of the 2% discount.

Q. Can you elaborate on your answer, please?

A. Yes.

Two percent discount is normally allowed based on a payment at a specific time. With every large dealer, in any event,

the discount was allowed, either on a 30 day late basis, 60 day late basis or 90 day late basis, or as high as six—actually, there was no limit.

Q. Could they still qualify under those circumstances for the 2% discount?

[7072] A. Not technically, but it was allowed.

Q. Was this a competitive device?

A. Yes.

Q. Now turning first to your telephone conversation, would you please identify the corporations and the individuals at those corporations with whom you had these types of discussions, starting with United States Gypsum.

A. With U. S. Gypsum, I talked to Walter Scott, Dick Russell.

Mr. MELLOTT. If the Court please, I will object to this question unless the dates are specifically identified.

Mr. FRICANO. Through the time period you were with Kaiser as a credit man.

The WITNESS. I can't——

Mr. MELLOTT. I object unless the date on which the conversation took place is identified.

The COURT. You want the date of each conversation?

Mr. MELLOTT. I would like at least the year, Your Honor.

The COURT. You can give it over what period of years.

The WITNESS. We are talking about U.S.G. now.

[7073] My first conversation with Walter Scott was in 1955 and that was in Seattle, Washington. We discussed the company called Able Lumber Company. From that time on I didnt talk again to Walter Scott until I moved to Southern California and the telephone conversations occurred in 1956, '57, '58, '59, '60, '61 and '62 at various times.

[7074] By Mr. FRICANO:

Q. Could you do that with the other people, too?

A. Conversations with Dick Russell occurred during the year 19— from June, '62 till '63, when I was general credit manager of Kaiser.

There was another young fellow, and I can't—yes, I do remember his name. It was Earl Marsh who was an area credit manager for USG, and I talked to him during the year '62, June, '62 through June, '63.

Q. National Gypsum?

A. National Gypsum, my contacts were in the credit field with Rolli Campbell, and the first discussion with Rolli, when I first met him, was in 1959, I believe, and he was a close personal friend. We talked frequently from '60 until——

Q. You said '69.

A. Excuse me. '59 until even after my employment with Kaiser.

Q. All right. Anyone else from National Gypsum on credit matters?

A. Not during my employment with Kaiser.

Q. How about Mr. Gustavus?

A. This was limited to credit personnel, was it not?

Q. No, any personnel at these corporations that you had, in other words, if you had conversations with sales [7075] executives, dealing with credit, I would expect you to include those also.

A. I talked to Mr. Gustavus of National Gypsum frequently during the same time period.

• • • • •

Q. With respect to Bestwall Gypsum Company?

A. I talked to a man named Bill Coupe.

Q. Anyone else?

A. No.

Mr. MELLOTT. Could we have the date of that as well?

The WITNESS [continuing]. Oh, excuse me. Excuse me. This isn't—that isn't correct. I talked to one other man. He is now dead.

By Mr. FRICANO:

[7076] Q. At Bestwall?

A. Yes. McDaniels.

Q. McDaniels?

A. Bob McDaniels, who was a general credit manager for Bestwall, out of Ardmore, Pennsylvania.

Q. Could we have a time frame for that?

A. Well, I first met McDaniels in either 1957 or '58, in Long Beach, California, and I talked to him two or three times after that only.

Q. How about Coupe?

A. Coupe, I talked to frequently. Bill Coupe attended our monthly meetings in southern California.

Q. All right. How about at the Flintkote Company?

A. In the Credit Department, Gaylord Boggs and Jim Biswell.

I don't remember about the other people, if it was within '63 or not. There were others.

I talked to Leonard Ross occasionally, who was the general manager of Blue Diamond.

It was not Flintkote at that time. It was Blue Diamond Corporation, and I talked to a man named Bill Seitz.

Q. Anyone else?

A. That's all I can remember up through 1963.

Q. Oh, Fibreboard. Any from Fibreboard?

A. Yes. During my employment with Kaiser, I talked [7077] to Joe Verdoia, Paul Eskanasy and Russ Cottner.

Q. Now, did you talk with any other of your competitors that you haven't mentioned here so far?

A. What companies have we covered?

Q. USG, National, Bestwall, Flintkote and Fibreboard. Other manufacturers that were in existence at that time, Johns-Manville?

A. No, not with Johns-Manville.

Union Gypsum, Hugh V. Dorais, D-o-r-a-i-s.

Q. Was that company utimately acquired by someone?

A. It was acquired by National Gypsum Company.

Q. Now, you have testified that you also had meetings of a credit association on a monthly basis.

A. Yes. Yes.

Q. Would you please describe those meetings, that is, with respect to where they occurred, at the time when you had discussions on extended terms and so forth?

A. These meetings were generally held at a place called the Roger Young Auditorium, which was really a restaurant, in Los Angeles. They were luncheon meetings.

During the luncheon meeting itself, there was a formal exchange of dollars owed and delinquency status of our mutual customers.

After these meetings, after the formal meetings, we—I won't say always, but almost always—met in a [7078] coffee shop downstairs, and I am talking about the gypsum company credit

managers, and including a few other related industry credit managers, to discuss informally the condition of each customer, and, frankly, what we were doing with them.

Q. Did these deal with the competitive matters of extended terms and so forth?

A. Yes.

Q. Were any of the people whom you identified as a telephone contact in attendance at these meetings?

A. You mean the prior—okay, I think I understand. Yes, but I would have to go back over the list of names.

Q. How about at United States Gypsum?

A. No, they did not belong to this association and did not attend.

Q. How about National?

A. Yes.

Q. Campbell?

A. Rolli Campbell.

Q. Bestwall?

A. Bill Coupe, yes.

Q. Flintkote?

A. It was then Blue Diamond.

Q. Or Blue Diamond, excuse me.

A. Biswell, yes.

[7079] Q. Fibreboard?

A. Yes. Both Eskanasy and Verdoia, and they were employed at different time periods.

Q. Did you know a Harold Nolte at Flintkote or Blue Diamond?

A. Yes.

Q. Did he ever attend any of the meetings?

A. Harold was hired after I left Kaiser in '63, as I recall.

* * * * *

[7080] By Mr. FRICANO:

Q. All right. When you were on the telephone with these individuals discussing competitive situations on extended terms and a cash discount, did you ever make any notes?

A. Yes, I always made notes.

Q. You kept a record of your discussions?

A. Yes.

Q. Were these discussions—can you characterize them? Were they frequent, infrequent or what?

A. I would suppose I talked to each company, competitive company, probably once a week, average.

Q. Each one of the ones that you have——

A. One man from each company, probably, once a week.

Q. Do you still have your notes?

A. No.

Q. Why not?

A. I destroyed them.

Q. When?

A. 1959.

Q. Why?

Mr. DELOXE. Objected to as immaterial.

The COURT. Overruled.

By Mr. FRICANO:

[7081] Q. Why did you destroy your notes, sir?

A. I was instructed to destroy all notes and records relative to contacts and working with competitors.

I was instructed to do so by E. M. Clark, who was my boss.

Q. Did he give you a reason?

A. On a general basis, it was because of complications or anticipated complications with Texas Gypsum Company.

Q. Did you or anyone working for you go through the files at that time?

A. Yes. I had an assistant named Bill Singen, S-i-n-g-e-n, who helped go through the files and also my secretary, a Mrs. Velda Kautz, K-a-u-t-z. These are the two people that helped me go through the files.

[7082] By Mr. FRICANO:

Q. How did you physically go about doing it?

A. File folder by file folder, get in. And for each customer, as well as the competitor files, and anything that was noted as having been written in relation to a competitor were pulled out. And we didn't burn them, we just tore them up and threw them in the wastebasket.

Q. What were your instructions, if any, subsequent to Mr. Clark's telling you to destroy these documents with respect to keeping records of this character?

Q. How did you come to learn of their coming to the west coast?

A. I was asked by Mr. Hague to met with Mr. Campbell and Mr. Gustavus at the National Gypsum Company's new office, and be of assistance in any way that I could as to orientation regarding customers and credit terms and procedures that we followed on the west coast.

Q. Did you in fact meet with Mr. Gustavus and Mr. Campbell?

A. Yes, I did.

Q. How long a meeting was that?

A. As I recall, we had lunch and spent the rest of the day and part of the evening together.

Q. Could you capsulize—if you can, Mr. Downing—the thrust of what you told them at the time?

A. Basically, we reviewed every major customer in [7088] that area that they would be selling in. And, we went over the account payment condition of the customer. I let them know—this is all verbal and off-the-cuff. I let them know who we had extended terms with, and if there were any special credit arrangements. We talked about personalities of the customers involved. Each customer is different.

Q. Did they take notes? Did either Mr. Campbell or Mr. Gustavus take any notes?

A. I don't clearly remember.

Q. I interrupted you before, about the nature of the discussions. I am sorry.

A. Well, basically I told them everything I knew about every customer in answer to every question they had.

Q. Did you know why you were doing this, giving this information to a competitor?

A. Other than having been instructed to do it. Well, we like to get along with our competitors.

Q. Why?

A. Well, I can only answer personally for operating my own department. I'd like to have the same treatment in reverse under those circumstances.

Q. You can't get it without giving it; is that right?

A. That's right.

• • • • •

A. Well, we were not to continue keeping them.

Q. You were not to keep——

A. We were not to make any more notes that related to competitors' relationships.

Q. Were these instructions in writing?

A. No.

Q. Orally?

A. Orally, yes. I received a telephone call from Mr. Clark.

Q. Did you know at this time, or at least as of March 27, 1961, what the policy of the Kaiser Gypsum Company was with respect to:

1. Talking to competitors. And,

2. Keeping notes. The published policy, formal policy.

[7083] A. I don't recall seeing a written policy. I knew the verbally instructed policy.

Q. Well, the verbally instructed policy was what?

A. Well, we were not to keep notes. We were not to keep records of any meetings or discussions with competitors.

• • • • •

[7086] Q. Did Mr. Hague at this time, in 1961, contact his competitors on prices?

A. Yes.

Q. Did Mr. Costa contact his competitors on prices?

A. I was never a witness to his doing that. Not Costa.

Q. Did Mr. Harper ever contact his competitors on prices, the person to whom this was addressed?

A. Yes, he did. But I can't say it was after '61.

Q. Did Mr. Harper know that you, from the time period that you began up to the time that you resigned in June of 1963, that you were contacting your competitors on credit [7087] matters?

A. Yes, he did.

Q. Did Mr. Hague continue, through the time period June 1963 when you left the corporation, continue to contact his competitors on prices?

A. Yes.

Q. Do you recall when National Gypsum first came to the west coast?

A. As I recall, it was in 1959, and I think mid-year.

[7091] Q. Did you ever—do you recall a telephone conversation with United States Gypsum, Dick Russell, in 19—in or about the year June, 1962, to the year June, 1963, relating to a credit situation in northern California?

A. There were several discussions with Russell during [7092] that time period.

Q. Were you ever accused of anything by Mr. Russell?

A. Yes. I wasn't really accused. Mahar, who worked for me, was accused.

Q. Jim Mahar?

A. Jim Mahar; right

Q. What was he accused of?

A. He was accused of double-crossing Dick Russell in a previously agreed upon credit handling of a company, either Fresno or Bakersfield.

Q. All right, sir. When you left Kaiser in June 1963, what did you do?

A. I entered the gypsum wallboard dealer business.

Q. Where?

A. In—well, the first location was in Union City, California, just south of Oakland.

Q. Did you handle any one company's wallboard more than another?

A. Well, initially, I handled more Kaiser than anyone else, more Kaiser board.

Q. Did you have extended terms from Kaiser?

Mr. HIERING. I object to the relevancy of this, Your Honor.

The COURT. You may answer.

The WITNESS. Yes. The company I had [7093] was given an automatic extra 60 days credit on everything I bought.

Q. Did that help you in—well, I withdraw that. Did you have any price concession?

Mr. DELONE. Objected to as contravention, I thought, of the Court's ruling.

Mr. FRICANO. I am sorry, Your Honor.

By Mr. FRICANO:

Q. eWll, as of 12—as of December 15, 1965, do you recall a new policy by the gypsum companies?

A. Yes.

Q. Well, as of 12—as of December 15, 1965, do you recall a

A. They withdrew all special prices and adopted a standard price.

Q. Did this affect you?

Mr. DELONE. Objected to.

The COURT. I sustain that.

Mr. FRICANO. All right.

[7103] CROSS-EXAMINATION

By Mr. HIERING:

Q. Mr. Downing, you described meetings that were held monthly at the Roger Young Auditorium in southern California, is that correct?

A. Yes.

Q. That was a restaurant in Los Angeles, is that right?

A. Roger Young Auditorium is a combination of restaurant and meeting rooms. I don't think they have an auditorium there any more.

Q. Right.

A. There are many meetings held there every noon.

Q. It is located in Los Angeles, is it not?

A. Yes.

Q. The group you referred to, can you tell us the [7104] name of it?

A. Well, the overall organization is the Credit Managers' Association of Southern California.

Q. Now, the Credit Managers' Association of California was a branch or part of yet another group, was it not? It is part of a national association?

A. It is affiliated with the National Credit Association.

Q. National Association of Credit Men?

A. You are correct on your terminology.

Q. Just to get this straight, the group you are talking about was the Building Materials Division of the Credit Managers' Association of Southern California which, in turn, was affiliated with the National Association of Credit Men, is that correct?

A. It was building materials group and from there on, you are correct.

Q. The building materials group was part of the Credit Managers' Association of Southern California, is that correct?

A. Yes, it is.

Q. And the National Association of Credit Men, that is a national association of credit people that hold meetings from time to time for the purpose of exchange of credit information on customers is that not correct?

[7105] A. It is a national association made up of local associations. Now the level you are talking about, the local level are the groups that hold the meetings and these are held throughout the country by the local group.

Q. And the purpose of the meeting is for the credit people to get together to exchange credit information on the credit worthiness of their mutual customers?

A. Yes.

Q. And that is a normal practice among credit people throughout the country?

A. Yes, it is.

Q. This group that held the meeting at the Roger Young Auditorium, it included people who sold various building materials; it was not limited to gypsum wallboard producers?

A. Right, it included—and I think I stated that—people who sold generally related items.

Q. And so we are clear on how a group like this functions, is one of the basic functions of a credit manager to obtain as much information as possible on the financial condition and ability of customers to whom you are extending credit? That is right, is it not?

A. That is true.

Q. The normal sources of this kind of information are the suppliers of the customer, correct?

[7106] A. Yes.

Q. And this would include suppliers who were competitors and suppliers who may not be competitors?

A. That is correct.

Q. And this particular group in Southern California was made up of both, of Kaiser's competitors, other gypsum companies, and other companies in the building materials industry, is that not correct?

A. Yes.

Q. Is it not true also that the primary purpose of this organization, this building materials group, was to exchange information relative to past-due accounts receivable to be used as a guide for whether the member should or should not extend credit to a customer?

A. Exactly right.

Q. Then at your lunch meetings the procedure there was to exchange lists, was it not, of receivables?

A. During the formal meetings, yes.

Q. During the formal meeting you exchanged lists of past-due accounts?

A. Yes.

I can tell you what happened. Prior to a meeting we would submit the information to the Credit Managers' Association office and they would compile a printed list with the information you are talking about.

[7107] Q. And that was distributed at the lunch meeting?

A. Yes.

Q. And then you say or you said on your direct examination after the regular meeting there were meetings at a coffee shop at the Roger Young Auditorium?

A. Yes.

Q. And these were attended by producers of gypsum wallboard and also by others, were they not?

A. Sometimes, sometimes not. These were informal. These were not preplanned.

Q. I understand.

One of the people that attended these meetings in the coffee shop was Mr. Ed Gross of Southern California Building Materials Company, was he not?

A. Yes, he was frequently there, yes.

• • • • •

[7112] Q. Mr. Downing, this price information that you are referring to in your answer just before the noon recess, was that price information with regard to particular customers?

A. What I started to say, when we closed the session, [7113] is that I gained information relative to pricing practices and shipping practices and sales practices for our Sales Department, in addition to gaining credit information.

Q. These were prices to customers that you were discussing at these meetings, is that what it was?

A. I am talking about gypsum prices, gypsum manufacturer prices to customers.

Q. To the customers that you were discussing at the meeting?

A. Yes.

Q. Now, you did not have any price authority, did you?

A. No.

Q. When you were with Kaiser?
A. No.
Q. You didn't have any authority to change published prices?
A. No, none.
Q. You didn't have any authority to grant a price concession off the published price to a particular customer, did you?
A. No, I did not.
Q. You didn't have any responsibility for reporting on competitive prices, did you?
A. I had an implied responsibility, yes, and I did.
Q. Well, when you say "an implied responsibility," [7114] you are talking about passing on anything that might be of help to the company that you might pick up, is that what you mean?
A. That is correct.
Q. But other than that, you had no specific responsibility with regard to prices, did you?
A. Getting back to your other question, I didn't set prices and had no influence on pricing.
Q. You had no specific price responsibility whatever, did you?
A. I just told you I was an investigator of sorts relative to price.
Q. Did somebody tell you to go out and investigate?
Mr. FUCANO. If Your Honor please.
The COURT. Don't do that.
Mr. HIERING. I am sorry. I didn't mean to interrupt him, Your Honor.
The COURT. Wait. Now, let him finish.
What were you saying?
You cut him right off in the middle.
Mr. HIERING. I was just about to ask him, Your Honor, to finish his answer.
The WITNESS. It was a normal practice to report back anything that I learned relative to price, shipping practices, toploading, whether we put sleuters on [7115] cars, anything of this nature, to the sales department.
Now, that was as well a defined responsibility as any responsibility I had.
Q. I understand. But you weren't given any specific responsibility to go out and find prices in the marketplace? Nobody told

you to go out and find what the prices were in the marketplace, did they?
A. Oh, I was asked to, yes.
Q. Who asked you to do that?
A. In this case and during this period, first, it was Hague, and, second, it was Donovan.

* * * * *

[7122] Q. Now, Mr. Downing, at these meetings at the Roger Young Auditorium, did you ever sit down with your competitors and say, "We are going to have a plan of operation and all the companies are going to abide by the plan of operation."
A. No, we never did that.
Q. And the last meeting that you attended at the Roger Young Auditorium was 13 years ago; wasn't it?
A. Probably 1962.
Q. 1962?
A. I would guess yes, the spring of '62.
Q. Approximately 13 years ago?
The COURT. From '62 to '75 is 13.

By Mr. HIERING:

Q. The United States Gypsum Company never attended [7123] any of those meetings, did they?
A. No, they never did.
Q. They were not a member of the group?
A. They were not a member of the Association.

* * * * *

Q. I'd like to turn to your testimony this morning about a telephone call that you received from a Mr. Richard Russell of USG in which you said he advised you that your subordinate Mr. Mahar, had doublecrossed him with respect [7124] to an account. Do you recall that testimony?
A. Yes.
Q. Now, was that account Stewart and Nuss? Is that the account that you were referring to?
A. It was an account, as I recall, either in Fresno or Bakersfield. I don't know if it was Stewart-Nuss or if it was Nice Building Materials. It was one of the problem accounts in that area, and I really can't say now which one it was.

Q. All right. And when was this in point of time?

A. It was after I moved to Oakland as general credit manager, so the only thing I can identify is some time between June '62 and July '63.

Q. Isn't it a fact, incidentally, that all of the telephone calls that you had during this one-year period, from June of '62 to June of '63, when you were general credit manager at Oakland, were all normal communications with your competitors except for this one call with Mr. Russell.

Mr. FRICANO. Objection. Object to the form of the question. I don't now what "normal" is in this context.

The COURT. I don't know. Maybe the witness does.

Do you?

[7125] The WITNESS. Not really, no.

The COURT. All right.

Mr. HIERING. I'd like to read from Mr. Downing's testimony on February 6, 1970 at page 5984.

> Question. Can you tell me with whom you had telephone calls during——

Let me back up for the time period. During the period 1962 to 1963 when he was General Credit Manager, Kaiser Gypsum Company, in Oakland.

> Question. Can you tell me with whom you had telephone calls during that period?
>
> Answer. I know I talked to Biswell, Campbell, Dick Russell of USG, and Bill Cook of Bestwall.
>
> Question. Do you recall any particular telephone call?
>
> Answer. I can only recall one that was of any outstanding nature. The others were normal communications.
>
> Question. With whom was that one telephone call that you——
>
> Answer. It was with Dick Russell of USG.

By Mr. HIERING:

Q. Now, are those the questions that you were asked [7126] and the answers that you gave at that time?

A. I believe so. If it is in the deposition, if it is in the testimony, I say so.

Q. Do you know what Mr. Russell and Mr. Mahar had agreed to?

A. No, I don't remember at this time.

Q. The account—You say you don't remember the name of the account, but is it not a fact that the account was either in bankruptcy at the time or being handled by an assignee?

A. I don't remember. It could have been.

Q. Well, I'd like to read to you from page 995 of your testimony on February first and second, 1972.

* * * * *

> [7127] Question. Had Mahar, in fact, deviated from what he had led Mr. Russell to believe the way he would handle it?
>
> Answer. Well, of course, I did not know what they had agreed to. This was kind of on a local basis, but my impression was that he had, in fact, double-crossed Russell; yes.
>
> Question. Did he expect or request any corrective or remedial action by you?
>
> Answer. Yes, he did, but it was too late. Nothing could have been done, at that point. This account was either a bankruptcy or being handled by an asignee, and anyway, these things you do not influence at a later time.

Is it not a fact that this particular——

Mr. FRICANO. Objection. What purpose did he read the testimony to the witness for, Your Honor?

Mr. HIERING. I am sorry. For impeachment, Your Honor.

By Mr. HIERING:

Q. Were you asked those questions, and did you give those answers?

A. I think I did.

* * * * *

[7128] Q. Well, Mr. Downing, do you not know that Mr. Mahar and Mr. Russell are on the Creditors Committee, that were elected under the bankruptcy laws of this country with respect to the account?

A. You will have to understand, I did not follow all these details. This was the responsibility of Mr. Mahar. I don't remember every problem account Kaiser had and all the credit prob-

lems it had. I do know Mr. Russell called, and he was mad. I didn't like the man, anyway, and it stuck in my mind. It was just an unusual telephone call.

[7129] You are asking me questions I really don't have a background to answer.

* * * * *

[7130] Q. All right. Let me try to go about it more simply. If you asked a competitor if a customer is current with him and is discounting his bills within the period of time allowed to earn the two percent cash discount, it makes quite a difference, does it not, whether the man has regular terms or whether he has extended terms of 30 or 60 or 90 days?

[7131] A. It does make a difference.

Q. It makes a difference with respect to how much money is outstanding on that acount; does it not?

A. You mean how much money the competitor has outstanding with the account?

Q. That's right.

A. Yes. That is a measure—or a standard of measurement. Yes.

Q. Now, if the credit terms at a particular time are two percent, 10th prox, what does that mean with repect to purchases in January?

A. Well, by the terms, they should be paid on February 10th.

Q. So that, if purchases are made on January the first, if the man wants to earn his 10—his two percent cash discount, he has to pay by February the 10th; is that correct?

A. Well, those were the published terms. That isn't what happened.

Q. No, but I am just stating hypothetically, if the actual terms are two percent 10th prox, that means that any purchases in January would have to be paid by February 10th for the customer to earn the two percent cash discount; is that not correct?

A. That isn't the way it happened.

[7132] Q. I am not——

A. So it is not correct.

Q. Well, I am asking—were there not some customers at some point in time, in the gypsum industry, that were paying within published terms?

A. Yes, there were a few.

Q. All right. Now, with respect to those, and where the—during the time when the published terms were two percent 10th prox, those customers would have to pay for their January purchases by February 10th in order to earn two percent cash discount; is that not correct?

A. You are inserting a word, and I don't mean to nitpick this, but you say they have to pay. No, they didn't have to pay. They got their discount, anyway, but frequently, the smaller customers did pay by the 10th and did correctly earn their discounts.

[7133] By Mr. HERING:

Q. There were some to whom the published terms were applicable, were there not.

A. Yes.

Q. And those customers, if they bought in January, had to pay by February 10th if they were going to earn the 2% cash discount, would they not?

A. They were supposed to pay by the 10th.

Q. All right.

A. I object to your word had to.

Q. All right.

Now, if their purchases were on January 30th, they were supposed to pay by February 10, if they were to earn the 2% cash discount, is that not correct?

A. Not as I remember. We had a cut-off date that I think was the 20th or 25th. So in either case—my memory is hazy on this—but in either case, had it been shipped on January 30th, it would be subject to a proper discount on March 10.

Q. When the cut-off was in effect those purchases at the end of the month were considered part of February's business, is that correct?

A. That is correct.

Q. Is it not a fact that cut-off date was eliminated effective March 1, 1966?

[7134] A. I believe it was, as I recall now.

* * * * *

Q. * * * Let's just take it hypothetically, Mr. Downing, and I am using this for illustration, not what the terms happened to be at any particular point of time.

[7135] During a time when there was no cut-off and the payment for cash discount was the 10th of the following month, even then any purchases in the month of January would have to be paid or were supposed to have been paid by February 10, if the cash discount of 2% were to be earned?

A. Supposed to be, yes.

Q. So that if a customer were discounting his bills and receiving published terms, you would have a pretty good idea of how much was outstanding in the way of debt to a particular supplier, if you had an idea of what the man's volume was, wouldn't you?

A. If we had accurate information, yes.

Q. Let's take a man that you would estimate is doing $1,000 a day in business, $30,000 a month, roughly.

If he were discounting his bills, you would have a pretty good idea of how much money he had outstanding at any point in time, how much debt he had outstanding, would you not?

A. I want to qualify this again. If we had accurate knowledge he was discounting his bills, you are exactly right.

Q. So a man who is buying $1,000 a day you would estimate would have what, $25,000 outstanding, if he is discounting his bills? Is that not right, approximately, assuming your information is accurate?

[7136] A. Are we back to our cut-off date of the 20th?

Q. No.

A. The calendar month?

Q. Calendar month.

A. He would have closer to $35,000, but it is academic, isn't it?

• • • • •

Q. Now if this man had an extra 30 days within which to pay his bills and earn the cash discount, those January purchases wouldn't have to be paid until the 10th of March, isn't that right?

A. That is correct.

Q. And the man's outstanding debt would be considerably

[7137] more, wouldn't it?

A. It would double, wouldn't it?

Q. It would be double, right.

So that the question of whether a man was paying his bills and getting the cash discounts on your regular terms or whether he had extended terms was a very important thing to know, if you were trying to evaluate the amount of debt he had outstanding, wasn't it?

• • • • •

The WITNESS. I would like to rephrase it.

If we knew how much a man owed and we knew the basis upon which he was paying, yes, then that is an important point.

I come back—I object to your analysis of discount, because this is misleading. Very few people ever discounted on time.

Q. Well, if somebody said to you that their customer was discounting his bills, that wouldn't mean very much to you unless you knew if he had extended terms or not, would it?

A. That is correct.

• • • • •

[7138] RE-DIRECT EXAMINATION

By Mr. FRICANO:

Q. When you attended these meetings in the LaFayette Hotel—excuse me. The other hotel, what was it?

A. The Roger Young Auditorium.

Q. You testified pursuant to questions by Mr. Hiering on cross-examination that you always passed on—my note, if it is incorrect, please tell me. My note is that you passed on a lot of price information from the sales department.

A. No, you misunderstood me.

I gathered as much information as I could for the benefit of the sales department.

Q. To whom in the sales department did you supply this information?

A. It depended on who the manager was at the time. For a time period, Jim Hague. For another time period, Tom Donovan.

Q. Did they write it down, do you recall?

[7139] A. I don't know.

Q. You say in addition to prices, you also passed on shipping information, packaging information, toploading information and whether sleuters were being used on cars.

A. What I said in total, I think, was that I passed on any information that related to sales activities. I listed these as some examples.

Q. Did you ever pass on any information relating to such give-away programs as extra dunnage?

A. Yes.

Q. Was that a factor in the marketplace in California?

A. Yes, off and on.

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[7140] Q. Back to the lath unit, have you ever heard of the practice of taking the three units of lath and putting an extra sheet at the bottom of each stack, labeling it dunnage, but, in fact, it was a give-away program?

Mr. HIERING. I object to that question because it has nothing to do with anything I asked him.

The COURT. You may ask him.

The WITNESS. Yes, I am aware of that practice.

By Mr. FRICANO:

[7141] Q. Was that going on at the time you were on the West Coast?

A. Yes. Not all the time.

The COURT. Ask him whether that was discussed at these meetings, not whether it was going on.

By Mr. FRICANO:

Q. Was it discussed at the meetings?

A. Yes, off and on.

Q. Was anything said concerning the elimination of this practice?

A. No. At these meetings I am referring to there was no decisions made, no discussion of policy. I was just a——

Q. Conduit?

A.—detective, I guess.

Q. Did you also volunteer information concerning Kaiser Gypsum's packaging, shipping, toploading, and so forth?

A. When I got backed into a corner, yes.

Q. Did your superiors, Mr. Hague and so forth, know when you were backed into a corner you gave out information, too?

A. Yes, I usually told them what I passed on.

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[7144] RICHARD ALAN MILLER, called as a witness, and having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

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DIRECT EXAMINATION

By Mr. THORSON:

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A. My name is Richard Alan Miller.

Q. Where do you live?

A. I live in Middletown, Connecticut.

Q. What is your occupation?

A. I am Professor of Economics at Wesleyan University.

Q. Is that located at or near Middletown, Connecticut?

A. That is in Middletown.

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[7162] Q. Would you restate your name, please?

A. My name is Richard Miller.

Q. And you are a professor of economics at Wesleyan University?

A. Yes.

Q. And as a professor in economics, are you regarded as an economist?

A. Yes, I am regarded as an economist.

Q. What college degrees do you have?

A. I received a Bachelor of Arts degree from Oberlin College and a Master of Arts and Doctor of Economics degree from Yale University.

Q. In your bachelor's degree, what was your major field of study?

A. Mathematics at Oberlin.

Q. And your graduate degrees?

A. Both the M.A. and Ph.D. were economics.

Q. And when you say a Ph.D., is that what sometimes is referred to as a doctor's degree?

A. Yes.

Q. Have you, at any time, done any work with or for the Antitrust Division of the Department of Justice?

A. Yes, I have.

Q. When was that?

[7163] A. I was on leave from Wesleyan for the academic year 1973–74, and I spent that with the Economic Policy Office of the Antitrust Division in Washington.

Q. And in connection with your work with the Antitrust Division, did you have occasion to do any work for or with the staff handling the gypsum matter?

A. Yes. On several occasions, I worked with the staff and prepared several studies for Mr. Fricano.

Q. As an economist, are you familiar with statistical presentations of any kind?

A. Yes, I am.

Q. Do economists use statistical proceedings in their work?

A. It is common for economists to use statistics and to present statistics and statistical summaries in various forms.

Q. And do they also read and study statistical studies as a regular part of their work?

A. Yes, they do.

Q. What types of forms can statistical summaries frequently or commonly take, if you could describe a few of them, please?

A. Statistical summaries can take several forms. They can take the form of a single number, like an average. They can take a form of a chart or a bar graph or a table. [7164] On occasion, they can even be summarized in equations.

Q. When you say chart or bar graph, are these sometimes in a pictorial or picture type presentation, as opposed to word or numbers?

A. Sometimes, yes.

Q. Now, would something as common as the major league baseball standings be regarded as a statistical presentation?

A. Yes. I would think of that as a statistical presentation.

Q. In tabular or chart form?

A. In tabular form, it would present the rankings of the teams in order of their won-lost percentage.

Q. And maybe how many games behind the leader they are?

A. How many games behind they are.

Q. Now, have you had occasion, in connection with your work, have you had occasion to prepare any statistical summary of sales data for gypsum sales by companies engaged in that line of business?

A. Yes, I have.

Q. And would you describe briefly what type or form of statistical form of sales study or data you performed or worked on?

A. I have calculated percentage shares of board sales for individual companies for various years.

[7165] Q. And what did you use as your source for data to include in your computation?

A. The source of data was a stipulation—what I understand is a stipulation regarding sales of gypsum board by the various companies in the gypsum wallboard industry.

Q. And is that a stipulation which has been identified to you as GX 7, with a Schedule C attached to it?

A. Yes. It has been so identified to me.

Q. And did that contain dollar sales figures for the various gypsum companies for various years?

A. It contains dollar of board products, company by company, year by year, from 1960, I believe, to 1973.

Q. And in the chart that—or did you prepare a chart using some of this data?

A. A chart was prepared.

Q. Under your supervision?

A. Based on the calculations I made. I didn't physically prepare the chart myself. It was based on the shares of wallboard sales that I had calculated from Schedule C and from a letter from Mr. Montgomery to Mr. Fricano.

Q. And what effect, if any, did that letter have on the sales data that you used in the preparation of this chart?

A. Pertaining to Flintkote sales, Mr. Montgomery [7166] wanted to add sales for two particular years for Flintkote, 1972 and 1973 and wanted to adjust the sales as they appeared on Schedule C to make them comparable to the sales figures reported for the other companies for certain years.

Q. And what years or time span did you cover in your portrayal on this chart?

A. 1965 through 1973.

Q. Now, why was 1965 chosen as the beginning year for the chart?

A. I believe that was the first year in which Georgia-Pacific sold wallboard.

Mr. THORSON. If Your Honor please, at this time I would like to display on the easel the chart that Dr. Miller has prepared.

By Mr. THORSON:

Q. We have exhibited, now, a chart which bears the exhibit number GX 3800. Is that the chart that you had prepared, Dr. Miller?

A. Yes, it is.

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[7173] Q. Dr. Miller, referring again to the market share chart, GX 3800, on the left-hand margin where you have a number of companies listed starting United States Gypsum, National, the next is Georgia-Pacific and you have a number one in a circle beside it. What does that signify or indicate?

A. That indicates the footnote at the bottom of the chart, Mr. Thorson. It refers to the purchase by Georgia-Pacific of the Bestwall facility in 1965. What I did was to add Bestwall sales for 1965 to Georgia-Pacific sales for 1965 and consider that a single company for purposes of this calculation.

Q. And were those separate sales figures for the portions of the years for each of those two companies [7174] indicated on Schedule C which was your source for the data?

A. Yes, Schedule C clearly indicated the Bestwall sales were for the months January, February, March and April and Georgia-Pacific sales were for May through December.

Q. Could you take the pointer, Dr. Miller, and point to the next name, which is Celotex, which is in a fainter color. It is not as bold as some of the others. There is a number two alongside it. What does that figure indicate?

A. That two refers to the second footnote. Celotex sales were reported on Schedule C on a fiscal year basis from the first of September to the following August 31. I included the Celotex sales for each year for the fiscal year as indicated, as if they had occurred in the entire year indicated along the bottom. So that for the year 1965, as indicated on the chart, I would include Celotex sales for its fiscal year ending August 31, 1965.

Q. Did the Schedule C indicate whether the other companies were on a calendar year rather than a fiscal year basis, or could you tell?

A. I believe they were all on a calendar year basis. There were no other indications suggesting any other company was on a fiscal year basis.

Q. It was only as to Celotex there was a fiscal [7175] year indication?

A. Yes.

Q. Now, did you try to—in the preparation of this chart, did you try to have a different color reflecting each different company?

A. The instructions to the person who actually made the chart were to make a different color, use a different color for each company.

Q. And I notice on the right-hand side of the chart you have some bars with colors and then a name written alongside of it. What is the purpose of that listing of names?

A. That is color code for the firms, sellers, whose market shares are indicated toward the bottom of the chart, and whose names could not be squeezed in as the others were along the left.

The Johns-Manville color, for example, is this next brownish-greenish color, and Fibreboard is the blueish color. For the first four or five years, 1965 through 1969—Fibreboard's last year I believe was 1969.

Q. The Fibreboard color line appears to end at 1969. Does that indicate that the last year for any sales data that were on Schedule C for Fibreboard was 1969?

A. Yes, I believe it does.

[7176] Q. And proceeding down the chart, the next is violet with Weyerhauser, and then American and Grand Rapids, GAF, Texas, Republic and California. The California is in orange. Where does that first appear on your chart?

A. The first sales by California were for 1972 and it appears as a very slight distance at 1972. The percentage was 14 hundredths of one per cent, according to my calculations, and that is, given the scale of the chart, a very small-distance.

Q. Does the width of the particular color line for an individual company have anything to do with the market share that it had in any particular year?

A. If you are talking about the width in this direction.

Q. Yes, the vertical width.

A. The vertical width, yes. The vertical width is proportional to the percentage shares of sales and the bigger that

vertical width or the bigger that distance, the larger the percentage share. So the percentage share of United States Gypsum, as indicated, was much larger than the percentage share of these other companies, particularly the ones at the bottom.

Q. So if the color line reading across the chart grew narrower at some point, that means that its market [7177] share had gone down during that period of time, is that right?

Mr. MELLOTT. I object to the question. Mr. Thorson continues to use the term "market share." The witness testified it is percentage share of sales, so I suggest the form of the question should refer to the percentage share of sales.

Mr. THORSON. I would be happy to phrase it that way, Your Honor.

The COURT. Let's do it.

By Mr. THORSON:

Q. If reading across the chart the width of any company's color line gets wider or narrower, what does that signify?

A. That indicates its percentage share of sales would decrease or increase. If the width got narrower, the share would decline.

Q. Does it necessarily mean an increase or decrease in the dollar volume of sales for that year, for that company?

A. From this chart you cannot tell that. You can tell only the percentage.

Q. Percentage of the total?

A. Yes.

Q. Now on the left-hand side I believe you have [7178] percentage points marked off in 10 per cent increments, is that correct?

A. Yes.

Q. And horizontal lines going across the entire chart. Could you take a year, for example, say 1970, and from your chart read off the approximate percentage shares of the companies indicated thereon and point to the projections on the chart as you are doing so?

A. For 1970 the USG share is indicated at 31 or 32 per cent. For National, the percentage is the distance—and I would have to use fingers on this——

Q. Do you have any notes to which you could refer that would indicate the percentage figure for National for that year without having to make a measurement on the chart?

A. Yes, I have such notes.

[7179] By Mr. THORSON:

Q. Could you refer to those notes and tell us what percentage share the other companies had during 1970?

A. For 1970?

Q. Yes, sir.

A. National's percentage share was between 24 and 25, 24.6, 24.7, and, from the chart, the mechanical distance is very hard to get down to the last decimal point.

My calculation is 24.7.

Georgia-Pacific, 11.4.

Celotex, 9 percent.

Flintkote, 7.6.

Kaiser, 6.3 percent.

Johns-Manville, 2.9.

Weyerhauser, 1.95.

Republic, 1.6.

Texas, 1.2.

Grand Rapids, American and GAF—each was under one percent, Grand Rapids slightly under, American slightly under, and my calculation for GAF for that year was five hundredths of one percent.

Q. Now, on voir dire examination by Mr. McSweeney, you were asked what the Flintkote sales figure was for 1965, and I believe you mentioned the figure 18 million dollars and something; is that correct?

[7180] A. Yes.

Q. Did that figure appear on Schedule C or in the defense counsel's letter, which has been marked Exhibit 5025?

A. No. That figure does not appear on either of those two documents.

Q. Now, how did you arrive at that figure for Flintkote for 1965?

A. The letter from Mr. Montgomery proposes a method of calculation for sales figures for Flintkote for the years 1966 through 1971, to make the Flintkote sales comparable to the sales figures in Schedule C of the other companies. And I took Mr. Montgomery's method of calculation for the years '66 through '71 and applied that method of calculatoin to '65 data for Flintkote and used that, so that it could be comparable to the sale figures of the other companies and comparable year by year.

Q. Were you provided a correction factor in numerical form for making this adjustment?

A. Yes. The numerical correction factor was listed in this attachment to Mr. Montgomery's letter, to the seventh decimal point.

Q. To the seventh decimal point?

A. Yes, sir.

Q. And you computed it using that correction factor out to——

[7181] A. Yes, sir.

Q. Dr. Miller, does the term, "concentration ratio," mean anything to you as an economist?

Yes, it does.

Q. Could you describe briefly, in layman's terms, what concentration ratio refers to?

A. A concentration ratio is a percentage share of shipments or of output in some form by the largest companies in a particular industry. Concentration data most frequently used by economists are published by a part of the United States Government for manufacturing industries.

Q. And could you describe how or in what terms concentration data are normally represented or reflected?

A. They are normally represented as the share of value of shipments accounted for by the largest four firms in an industry, by the largest eight firms, by the largest twenty firms, and by the largest fifty firms.

Q. What reason is there, if any, for using the largest four or the largest eight for purposes of concentration ratios?

A. The data are collected by the Bureau of the Census every five years for manufacturing firms, and, to get good responses from those firms, the Bureau of the Census guarantees that the data which the firms supply will not be revealed in any way that will permit any observer to identify [7182] the date pertaining to a single company, so that, if the Bureau of the Census were to publish a one-firm concentration ratio, that, of course, would reveal to anybody the data about that largest firm, and the Bureau of the Census could, if it wanted to, publish a two-firm concentration ratio, but one of the two firms could identify the information from the other firm. And the Bureau of the Census figures that four is the appropriate number, to avoid disclosure of individual firm data.

Q. So, by grouping together the collective data from various individual companies, by grouping together with four companies, then, it would not tend to reveal the individual data of any one of the companies; is that correct?

A. Yes, sir. That is right.

Q. Now, is there any reason why Census or economists sometimes use an eight-firm concentration ratio?

A. Why they use it, or why it is eight firms as opposed to something else?

Q. Yes, I mean is eight firm—is an eight-firm concentration ratio one that is commonly used?

A. Yes.

* * * * *

[7184] Q. Now, with reference to the sales data in Schedule C, Dr. Miller. Did you make any computations of totals, either by companies or for given years, or for the entire industry, to add up individual sales figures?

A. Yes, I did.

Q. And what computations did you make?

A. To compute the shares I had to add the dollar sales for all the firms in each year. I also added the sales for all firms for all years, 1960 through 1973.

Mr. MELLOTT. Excuse me.

By Mr. THORSON:

Q. When you added those, what figure or sum did you [7185] come up with?

Mr. MELLOTT. Excuse me, Your Honor. It appears that the witness is referring to notes. I wonder if we could have copies of them?

The COURT. Well, you can see them when it comes time to cross-examine, if you wish.

Mr. MELLOTT. All right, Your Honor. Thank you.

The COURT. Go ahead.

Mr. THORSON. Perhaps I could ask the question again.

By Mr. THORSON:

Q. I believe you stated that you added up the total for all the companies for all the years in Schedule C; is that correct?

A. Yes.

Q. And what sum total of total industry sales did you reach from this addition?

A. The sum total is five billion, one hundred seventy-four million dollars. That's industry sales, all companies. And, it includes the adjusted sales figures for Flintkote as adjusted in the attachment to Mr. Montgomery's letter for the years 1960 . . .

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[7186] Q. Dr. Miller, continuing in your testimony about the computation of the total industry sales for all the companies for all of the years on Schedule C, I believe you came up with a total figure of 5.1 or 5.2 billion dollars?

A. That's correct.

Q. Now, in explaining how you arrived at that total figure, I believe you started describing how you treated the Flintkote figures. Would you repeat and describe how you handled Flintkote sales in computing this total?

A. For the 1972 and '73 figures I took the figures that were in Mr. Montgomery's letter for Flintkote for the years 1966 through 1971 inclusive. I adjusted, used the adjusted figures as Mr. Montgomery had suggested in his attachment that they be adjusted.

[7187] For the 1961 through 1965 figures for Flintkote I used them as stated in Schedule C unadjusted by Mr. Montgomery's method of adjustment. And Flintkote had no sales, as indicated in Schedule C for 1960.

Q. Now, does that mean that if you had adjusted those prior 1961 to 1965 Flintkote figures, the sum total would have been even higher than the total that you reached?

A. If I had made that adjustment, the sum total would have been somewhat higher, yes.

Q. Did you make any computations as to the total sales of any particular group of companies within the industry?

A. Yes, I did.

Q. And what group of companies would you make such a computation for?

A. For the following companies: United States Gypsum, National, Georgia-Pacific and Bestwall, Celotex, Kaiser, Flintkote, Johns-Manville, and Fibreboard.

Q. And did you add up their total sales?

A. Yes.

Q. And what figure did you arrive at adding the total sales of those companies for the entire period on Schedule C?

A. For the period 1960 through 1973 the total for those companies was four billion, eight hundred seventy-four million dollars.

[7188] Q. Did you make any computation as to what percent of total industry sales for the entire period were accounted for by that group of companies that you read off?

A. For those eight companies, for those years, the percentage was slightly over 94 percent.

Q. Alluding once again to concentration ratios, and taking, for example, 1970, could you tell us what concentration ratio computations you made from the data that you used in the preparation of this exhibit GX 3800?

A. I made a cumulative percentage share for the companies rank by size, so that I have indeed concentration ratios for the largest one, the largest two, the largest three, et cetera.

Q. Well, suppose we were to use the Bureau of Census standard in taking 1970 as an example. What was the concentration ratio in that are for say the four largest firms?

A. For the four largest firms, between 76 and 77 percent.

Q. What was the concentration for the 5th and 6th and 7th largest, and 8th largest firms combined during that year 1970?

A. Combined with the largest four?

Q. Yes.

A. The largest eight together had somewhat over 95 percent of the sales of gypsum board in 1970.

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[7193] CROSS-EXAMINATION

By Mr. CORTESE:

Q. Now, Mr. Miller, Defendant National Exhibits 101 through 109 are your computations of the individual percent shares of gypsum board sales in the years 1965 through 1973?

A. Yes.

Q. And would you just note for me the percentage [7194] that is shown on the year 1965 for United States Gypsum?

A. As shown here, 37.4 percent.

Q. What is the percentage shown for 1969 for United States Gypsum?

A. 1969, 32.95 percent.

Q. What is the percentage shown for 1973 for United States Gypsum?

A. 31.99 percent.

Q. Now, would you refer, also, to National Gypsum Company for those three years and give us the percent for each of those years?

A. For 1965, 24.66. What was the second year?

Q. 1969.

A. 1969, for National, 22.84 percent; and 1973, 24.62 percent.

Q. Now, would you refer to the share for Republic Gypsum in 1965, please, sir?

A. Republic Gypsum for 1965, 34 one hundredths of one percent, .34.

Q. What was Republic's share in 1969?

A. 1.63.

Q. And what was Republic's share in 1973?

A. 2.03.

Q. What was Weyerhauser's share in 1965?

A. 1.58

[7195] Q. What was its share in 1969?

A. 1.94, Weyerhauser.

Q. Weyerhauser, right, sir. And what about 1973? What was Weyerhauser's share in 1973?

A. 1.80.

Q. Now, would you do the same for Johns-Manville? What was its share c' percent of sales in 1965?

Mr. THORSON. If Your Honor, please, perhaps we could shortcut this and offer the documents in evidence, and we wouldn't have to go through reading the numbers.

Mr. CORTESE. This is the last one, Your Honor, the last company.

The COURT. All right.

Mr. CORTESE. This is the last company I am going to go into.

The WITNESS. Which company again, please?

By Mr. CORTESE:

Q. Johns-Manville.

A. 1965, Johns-Manville, 2.17; 1969, 3.22; 1973, 2.85.

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DICUSSION

[7237] Mr. FRICANO. If Your Honor please. The charts that we have, which were turned over to the defendants on Saturday, encompassed, I think, seven zones, over seven regional areas in the United States, and they go from 1965 up to a point in 1971.

Now, what Mr. Mellott has conveyed to us in certain instances establishes that there may be some error in those charts.

The COURT. Well, they can bring that out with Dr. Miller on the record.

Mr. FRICANO. Right. But if Your Honor please, if that's brought out on the record at this point and the jury sees that—Maybe one or two of the charts do have incorrect figures on them. There are figures all over running up and down the page. If there is some error, I would prefer, quite frankly, from the jury's standpoint, that we not strike that chart for something that we could correct.

The COURT. We may do it that way. But I want to hear it as I hear it on the record. I am not going to lull in the clouds.

Mr. FRICANO. No, no. I understand that, Your Honor. My point is this: if we were to put Dr. Miller on the stand now——

The COURT. As Mr. Keck asked me [7238] yesterday, "Do we admit documents without hearing the evidence?" We don't. I want to hear the evidence before I decide one way or the other.

Mr. FRICANO. Correct.

The COURT. And I don't want to go through it twice, once with the jury and once without the jury.

Mr. FRICANO. No, Your Honor. What I am proposing is the middle ground, if I might, because of this problem.

The COURT. If we can make corrections in the chart and take care of anything that comes out on voir dire, we will do it. It has been done before in this court and we can do it again.

Mr. FRICANO. I am wondering of a jury impact. If we say this is our final work product—which it may not be—and in the course of voir dire we have to correct the chart.

Mr. CORTESE. If Your Honor please, I think that's a chance that Mr. Fricano has to take.

The COURT. That's right.

Mr. FRICANO. No, I don't have to take that chance at all. I don't have to offer them at all.

Mr. CORTESE. That's right. That's the other option.

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[7243] • • •

REDIRECT EXAMINATION

By Mr. THORSON:

Q. Dr. Miller, in connection with this chart exhibit, which is GX 3800, showing percentage shares of gypsum board [7244] sales, in further connection with your decisions in constructing this chart in the manner in which you did, you have noted of course that you started, you have the vertical distance of the entire chart shows a hundred percent, which is the total composite shares for each year?

A. Yes, sir.

Q. And you start at the top with zero percent and work down to a hundred percent; is that correct?

A. Yes.

Q. Did you testify that the chart could have been constructed having zero percent at the bottom and a hundred percent at the top?

A. Yes, I did.

[7245] By Mr. THORSON:

Q. In each instance, would the chart so constructed have as vertical line increments 10 percent for each horizontal line going across the chart?

A. Yes.

Q. Sort of like parallels of latitudes on a map?

A. Yes.

Q. Now, regardless of whether the chart were constructed with zero at the bottom or zero at the top, is it not true that the width of the colored lines is the key that determines the percentage share for each individual company for each individual year?

A. Yes, Mr. Thorson.

Q. And does your chart, as you constructed it, in any way conceal or hide the fact that U.S. Gypsum's market share decreased between 1965 and 1967?

A. No, it doesn't. Indeed it shows the decrease from 1965 to 1967 for U.S. Gypsum.

Q. And all you have to do is just read down the side of the chart and you see that at this point its plotted position in 1967 is closer to the 30 percent line than it was in 1965; is that not correct?

A. Yes, that is corect.

Q. Now, would you explain why your preference was for starting at the top with zero percent and working down toward 100 instead of the other way around?

A. As I explained yesterday, the companies are ranked by size in 1965 from the largest to the smallest, and to me it seems natural to read from the top to the bottom as one reads down a page.

Q. In reading this chart, can one perceive concentration ratios as well as individual company market shares?

A. Yes, indeed. Concentration ratios are made up of percentage shares of sales.

Q. And in the normal way in which economists prepare concentration ratio tables, is there a standard way by which they start in terms of magnitude of companies involved in the list?

Mr. MCSWEENEY. If the Court please, there was no cross-examination about concentration ratios, none at all.

Mr. THORSON. If Your Honor please, this all relates to the order in which the various companies appear on the chart, which was gone into in depth on cross-examination.

The COURT. All right. Go ahead.

The WITNESS. May I have the question again, please.

[The last question was read back by the court reporter.]

[7247] The WITNESS. The concentration ratios as produced by the Bureau of Census are defined as the value of shipments of the largest four companies, so that it would be, the concentration ratio would be the sum total of the shares of shipments of the firms ranked 1, 2, 3, and 4 in any particular industry.

By Mr. THORSON:

Q. Are these lists made up so the top ranking or largest firm appears at the head of the list?

A. Yes, although the firms are not identified by the Bureau of Census, not identified by name.

Q. But on your exhibit chart, you did have data by which you were able to identify the particular company; is that not correct?

A. Yes.

Q. Now, if we were to invert the chart and if we were to read from right to left, we can still tell, can we not, the approximate percentage shares for each of the companies for each of the years, reading across?

A. Yes, the same data are contained with the chart upside down and with the chart the way I had it.

Q. If we turn the chart vertically, could we still tell; could we still tell the percentage share of each of the companies for each of the years by reading this chart?

[7248] A. Yes, we would have to read from the bottom to the top now from 1965 to 1973.

Q. But regardless of which perspective you look at the chart from, is there one key that determines the particular percentage share for a given company for a given year?

A. Yes, it is the width of the colored area for that particular company.

Q. It is how wide that colored line is, whichever company it happens to be, is it not?

A. Yes.

Q. And it matters not in terms of the width of that line whether the chart is rightside up, upside down or standing on its edge, does it?

A. That is right.

Q. Now, I believe you were also asked whether you made any attempt to change the order of ranking from year to year to reflect—I believe you mentioned that there were some changes in ranks during some of the years; is that correct?

A. That is correct.

Q. And you were asked whether you made any attempt to change the order of the colored lines for those years when those changes occurred?

A. I made no attempt to change the order of the [7249] companies from the order that existed in 1965.

Q. All right. I believe that the word used was if you did so the chart would become, I think, "messy"; what do you mean?

A. I used the word "messy," yes.

Q. You used the word "messy." Would you explain what you meant by "messy" in that connection?

A. If two companies changed rank from one year to another, then I would have to somehow cross the line for those two companies and mix the color. And I thought that would be a confusing way of presenting the data on this chart.

Q. So you chose this way for purposes of clarity; is that right?

A. Yes.

Q. And by crossing lines, meaning that the lines would have to crisscross each other as they went down the line from year to year——

A. Yes, or I would have to choose some other method of presentation besides this particular chart.

Q. For example, if you started out with Fibreboard, which is this acqua colored line, in 1965, and comparing it with American which is the yellow line below it, by the time you got to 1968 the yellow line for American is wider than the acqua line for Fibreboard, is it not?

[7250] A. Yes.

Q. Would it have been difficult for you to bring the acqua line and construct it below the yellow line for the year 1968?

A. Yes, it would have been.

Q. So would the method that you employed enable the viewer to see in a continuous flow the percentage share of a particular company as it goes through the years covered by the chart?

A. I believe it does.

• • • • •

[7260] WAYNE TAMBLYN

DIRECT EXAMINATION

By Mr. FRICANO:

Q. By whom are you employed, Mr. Tamblyn?

A. Georgia-Pacific Corporation.

Q. In what capacity?

A. Assistant to the treasurer and general credit manager.

Q. How long have you held that position?

A. I have been general credit manager for approximately 12 years.

Q. Perhaps if I could just read down your background and you can correct me if I am wrong, that might speed things up a little bit.

You first became employed by Georgia-Pacific in 1955, and then, through 1957, you were a junior accountant, and, from 1957 to 1959, you were on the internal audit staff and in 1959, you became Georgia-Pacific Company's accountant.

From 1960 to '63, you were comptroller of the Georgia-Pacific Division; from 1963 to '72, general credit manager of Georgia-Pacific, located in Portland; and from 1972 to the present, as you stated, you were the general [7261] credit manager of Georgia-Pacific and assistant to the treasurer. Is that correct?

A. The only correction would be I was the comptroller from 1959 through 1963.

• • • • •

[7279] • • •

Q. Examine this document, if you will, and then I will ask you questions concerning it, actually, two questions.

[The witness reads the document.]

And the attachment also.

Have you had an opportunity to read it now, Mr. Tamblyn?

A. Yes.

Q. Have you ever seen that document before?

A. I can't remember if I saw it or not, sir.

Q. Is it fair to say——

Mr. MELLOTT. If the Court please, I object to any further questioning concerning this document in view of the last answer by this witness.

The COURT. I haven't heard the question.

Mr. FRICANO. If Your Honor please, we were allowed to ask one question of the witnesses with respect to this that did not go into the detail of it.

The COURT. I haven't heard the question, so go ahead and ask it.

By Mr. FRICANO:

Q. Is it fair to say that this document, if you had received it personally, would have constituted a formal [7280] notification to you to stop?

Mr. MELLOTT. I object to that question, Your Honor.

The COURT. Overruled.

You may answer it.

The WITNESS. I am not sure that it would because of the fact that it talked principally about prices and exchanges of price.

By Mr. FRICANO:

Q. You did not construe that—well, I withdraw that.

The COURT. All right.

By Mr. FRICANO:

Q. All right sir. In any event, there was no formal notification to you to stop; is that correct?

A. I do not recall receiving any.

Q. And, number two, in that connection, you don't know whether or not any of your subordinates continued, do you?

A. I am not sure how you mean that, that they continued, when, after 1969 or——

Q. Throughout the period; throughout the period from 1965 to December 27, 1973?

Mr. MELLOTT. If the Court please, I object to that question as being cumulative and repetitious. [7281] He changed the question from what he asked him previously in any event.

The COURT. Can you answer the question?

The WITNESS. There were credit verification checks during that period.

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CROSS EXAMINATION

[7320] By Mr. MELLOTT:

Q. Well, do the branch managers—or did the branch managers, during this period that we have been talking about, have authority to sell at credit terms that he wanted to use, regardless of whether they were different from the standard policy of Georgia-Pacific?

A. The branch managers did sell at different terms during the period. We have talked about two percent 20th prox. The branch managers sold on two percent 10th prox, gypsum out of warehouse. In California, they sold one percent 10th prox. There is a variety of net. It varies by branch. Two percent 10th prox, net 11; two percent 10th prox, net the following 30; two percent 10th prox, net the following 10. It varies, depending upon the distribution center, and the marketing area that he is in.

Q. Did some of the branch managers, during this same period, use methods of granting extended credit such as holding up invoices?

A. Yes, they did this. This is simply a means of extending the terms of payment. Because we didn't have anybody at the branches, they could ship material, issue an invoice and then hold the invoice until a later period and then put it through, and, you know, we wouldn't really know.

Q. Well, Mr. Tamblyn, am I correct that it is not accurate to state that the credit terms at Georgia-Pacific [7321] with reference to the sale of gypsum products, from March 1, 1966, to December 27, 1973, was not always two percent 20th prox, net second 10th prox?

A. Yes, that would be correct. The actual sales were made on various terms.

Mr. FRICANO. Objection. He didn't respond to the question. The question was with respect to standard terms, and his answer was with respect to actual sales.

I move to strike; the answer was not responsive.

Mr. MELLOTT. I believe it was, Your Honor.

Mr. FRICANO. If Your Honor please——

The COURT. I don't understand the nature of your objection, frankly.

Mr. FRICANO. My objection is that the witness did not respond to the question. It was an unresponsive, confusing answer, when considered with respect to the question, and, as a consequence, I move to strike.

Mr. Mellott said "standard terms." The witness replied in terms of what actually was being done, like the difference between list prices and the difference between deviations.

The COURT. All right. Find out if there was a difference.

[7322] Mr. MELLOTT. I will be glad to ask some more questions along this line, Your Honor.

By Mr. MELLOTT:

Q. Mr. Tamblyn, am I correct that it is not accurate to state that the sales of gypsum products at Georgia-Pacific from March 1, 1966, until December 27, 1973, were all made on the basis of terms of sale of two percent 20th prox, net second 10th prox?

A. Yes, that is correct. And maybe I can clarify this a little bit. Our standard terms for out-of-warehouse shipments are two percent, 10th prox, and not two percent, 20th prox, as in the case of direct gypsum.

Q. So we have standard terms of two percent, 10th prox, which are different, obviously, than two percent, 20th prox; is that correct?

A. Yes, sir.

Q. And the branch managers, utilizing their autonomy, sell at different terms, credit terms, from time to time during this period; have they not?

A. Yes, I believe they have.

Q. And also——

The COURT. Do you know whether they have?

The WITNESS. Yes, sir.

The COURT. All right.

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RE-DIRECT EXAMINATION

[7338] • • •

Mr. FRICANO. I would like to offer 1234, Your Honor.

Mr. MELLOTT. If the Court please.

Mr. FRICANO. It is a third-party document.

Mr. MELLOTT. I am willing to acknowledge this document came from the files of Johns-Manville. However, I object to its admissibility. It is an internal document. There is no indication it was ever published and therefore I do not believe that——

The COURT. May I see it, please?

Mr. MELLOTT.—it should be admitted.

The COURT. The exhibit will be admitted.

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[7378] SANFORD B. KELLOGG

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Would you please restate your name?

A. My name is Sanford B. Kellogg.

Q. Were you employed by the Celotex Corporation from [7379] March, 1968, to March, 1972?

A. Yes, sir.

Q. In what capacity?

A. As regional credit manager.

Q. For what area?

A. 13 western states.

Q. Where was your office located?
A. In Los Angeles, California.
Q. Do the 13 western states have any significance as a geographic area in the gypsum industry?
A. Not that I am aware of. I don't understand your question.
Q. Well, from the time to time, did the credit situation differ in your 13 western states than it did in the eastern states?
A. Yes, sir.
Q. Was it—all right. Did you, from the time shortly after—I withdraw that.
Shortly after you were employed by the Celotex Corporation, did you, from time to time, contact your competitors concerning extended credit terms and the two percent cash discount?
A. Yes, sir.
Q. Did they also contact you from time to time?
A. Yes, sir.

• • • • •

[7383] Q. All right, sir. Now, with respect to that, is it not the fact that, in 1968, Mr. Jarrett specifically authorized you to engage in such conversations?
A. Yes, sir, but that also involves other product lines.
The COURT. Well, aside from the other product lines, as to gypsum board, is it applicable?
The WITNESS. It was, but it was not necessary.
By Mr. FRICANO:
Q. Wait—it wasn't necessary, but you just testified that you did it; didn't you?
The COURT. What wasn't necessary? When you say it wasn't necessary, do you mean it wasn't necessary that you have the authorization?
The WITNESS. I had the authorization.
The COURT. All right. All right.

• • • • •

[7384] Q. I will speak louder, sir. You did discuss, however, with your competition, their extended terms?
A. Only in the context that, if they were running slow in pay, I wanted to know that.
Q. Well—
A. But I did not ask them specifically whether or not they had authorized extended terms.

[7385] By Mr. FRICANO:
Q. Did you not attend meetings of a Credit Association from time to time? And, during those meetings, didn't you discuss credit generally with your competition?
A. Yes, sir.
Q. What was the nature of these discussions, Mr. Kellogg?
A. They always involved each of us reporting on past due accounts which were submitted ahead of time in writing to the Credit Managers Association. They would sum these up in a typed format and would present them to us at the monthly luncheon meeting so that we reviewed the status of late accounts, you might say, accounts that might be in trouble.
Q. Did you not discuss on occasion at these meetings, from time to time, general credit policies of various corporations with whom you met?
A. Yes. On occasion we would.
Q. And didn't you discuss on at least one occasion the elimination of the fast five percent discount in the West?
A. Yes, sir.
Q. And with whom did you have such a discussion?
A. At the time I received the communication that we were going to do away with the fast five, I was not in favor [7386] of such, because it had been a good credit tool to bring in the money. So I called a man at Johns-Manville. His name——
Q. Doug Hazeltine?
A. Doug Hazeltine, right. And confirmed that he had just received the same type of communication to outlaw the fast five also.
Q. Did you have any conversations with any of your other competitors to this effect?
A. Not that I specifically remember.
Q. Do you have a general recollection?
A. A general recollection? I may have called one or two other people.
Q. Who?
Mr. WARNKE. Objection, Your Honor.
Mr. MONTGOMERY. Objection as to what he may have done.
The COURT. What is your best recollection? That is what we are looking for.
The WITNESS. Well, my best recollection, for sure I talked to one. And I am not sure about the other two.

By Mr. FRICANO:

Q. Did you not talk to Don DeVore at National about the same thing?

[7387] A. At this time I am not sure that I did, no, sir.

• • • • •

[7389] Q. Do you know a Don DeVore at National?

A. Yes, sir.

Q. He was a credit man; wasn't he?

A. Yes, sir.

Q. And he attended these meetings that you attended; didn't he?

A. Yes.

Q. And wasn't he your contact on credit at National?

A. Yes. On gypsum matters, yes.

Q. And you say you don't recall whether or not you sought the same information from Mr. DeVore as you did from Mr. Hazeltine?

A. I say I just don't definitely remember having done it at this point in time.

Q. Did you definitely remember it at another point in time?

A. I don't think so. I thought about it quite a [7390] bit since then.

Mr. FRICANO. If Your Honor please, this impeaches. If I may hand it to the Court.

The COURT. If it impeaches now, go ahead.

Mr. WARNKE. Your Honor, might I ask that the Court look at it. I do not believe it does impeach.

The COURT. I haven't seen what is there. I don't know what is there. May I see it?

Mr. FRICANO. Certainly, Your Honor. From lines 12—I will mark it.

The COURT. I can remember the lines if you will tell me.

Mr. FRICANO. Oh, I am sorry, sir. Line 12 on 4955 over to the next page, sir.

[Exhibit handed to Judge.]

Mr. FRICANO. The second question where I said "definitely."

Mr. WARNKE. Might I ask that Your Honor look at the first question also.

The COURT. It does not impeach.

By Mr. FRICANO:

Q. Did you have a contact at the Flintkote Corporation on extended credit matters whom you also talked with at the Credit Association meetings?

[7391] A. Again I have to ask you what you mean by "extended credit matters?" Do you mean those accounts running past due?

Q. Yes, sir.

A. Yes. I would always try to find out what accounts were running past due with them. That means past their terms.

Q. And who was your contact at Flintkote?

A. Don DeVore, I believe.

Q. At Flintkote?

A. Wait a minute. No. Don——

Q. Sauer?

A. Sauer, yes sir.

[7392] By Mr. FRICANO:

Q. How often were these meetings held, Mr. Kellogg?

A. Once a month.

Q. What were the standard terms, if any, that Celotex employed on the West Coast during the period from March, 1968, to when you resigned in March, 1972?

A. The standard gypsum terms of 2 per cent, 20th prox, net following 10th with a 21 cutoff.

Q. Are those the terms that you see on the—are those the second terms that you see on Government Exhibit 5027 there on the easel?

A. Yes.

Q. Just returning for a moment to the 5 per cent. After you talked to Mr. Hazeltine at Johns-Manville and learned that they were going to eliminate the fast 5, did Celotex eliminate the fast 5?

A. I got the communication before I called the man at Johns-Manville. The communication that I received was that Celotex was going to withdraw the fast 5. And I knew that my friend at Johns-Manville felt, as I did, that it was a good credit tool, and I was hopeful of establishing a competitive situation with Johns-Manville if I could determine if they were going to retain it. So I called him to make that ascertation, and it was at that time that I was told that they also were dropping.

• • • • •

[7300] • • •

CROSS-EXAMINATION

By Mr. Montgomery:

Q. Well, Mr. Kellogg, when Johns-Manville or some other gypsum company made an announcement to the trade with reference to terms of sale of their product, those didn't come to your attention right away, did they?

A. No, they did not.

Q. How did you get that information, from customers?

[7400] A. Usually it would be relayed to me by the sales force, sometimes by a customer.

Q. And so you don't know whether when you talked with Mr. Hazeltine that Johns-Manville already had made its announcement to the trade?

A. No.

Q. Or you don't know whether at that time other manufacturers had already made their announcements to the trade?

A. No.

Q. Now, this credit association that you attended meetings of, that included manufacturers of a variety of building materials products, did it not?

A. That is correct.

Q. That was not just manufacturers of gypsum products?

A. No, it was manufacturers of all building materials.

Q. And when you had the conversation with competitors concerning the discontinuance of this fast 5 per cent, that was a conversation you had over the telephone with Mr. Hazeltine, was it not?

A. That is right.

Q. That wasn't a conversation that occurred at a credit association meeting?

A. No, sir, not that one.

• • • • •

[7409] HOMER D. JARRETT

DIRECT EXAMINATION

By Mr. FRICANO:

Q. Would you restate your name, please, Mr. Jarrett?

A. Homer D. Jarrett.

Q. I am going to recite your background with Celotex Corporation. If I am wrong on any particular, would you please correct me?

From November, 1965 to at least 1972, you were the general credit manager of Celotex; is that correct?

A. That is correct.

Q. And prior to that time, you had not been employed by any gypsum wallboard manufacturer?

A. Correct.

Q. And just so that there won't be any confusion, Mr. Jarrett, all my questions are directed to wallboard, gypsum wallboard.

A. I understand.

Q. You have been in the courtroom from time to time during this trial; have you not?

A. Yes, sir.

Q. And you have heard me only direct my questions to wallboard?

A. I understand.

[7410] Q. Subsequent to 1972, or perhaps in 1972, you got a new title?

A. Yes, sir.

Q. Which is?

A. Assistant treasurer.

Q. You no longer are the general credit manager?

A. No, sir.

Q. Who is?

A. Warren Reth?

Q. Was he your assistant while you were the general credit manager?

A. Yes, sir.

Q. Throughout the period November, 1965, to the time you became assistant treasurer?

A. No, sir. He was not with us in 1965.

Q. During what period was he?

A. '67, I believe, starting.

Q. Do you have regional—now, my questions are directed to the time period from November, 1965, through December the 27th, 1973.

During this time period, did you have regional credit offices throughout the country?

A. In five locations, throughout the country.

Q. Did they cover the country?

A. Yes, sir.

[7411] Q. Did you have a regional credit manager for each one?

A. Yes, sir.

Q. Was Mr. Kellog one of them?

A. He was.

Q. What function did they perform?

A. They performed the credit function on a decentralized basis from Tampa, which was general office, and they had their staff.

Q. Were they responsible for collecting the money owed to the company?

A. Yes, sir.

Q. And during the course of their responsibilities and their duties, were they authorized by you to contact competitors to check on alleged extended terms and cash discounts?

A. Yes, sir.

Q. Of course, they were authorized; you also were authorized, were you not?

A. Not specifically.

• • • • •

[7413] Q. All right, sir. And you say that you don't recall how you got into this bit of exchanging credit information with competitors, as I have defined it?

A. Well, in every credit area, there is an exchange of credit information.

Q. Oh, no. I am talking about extended terms and cash discounts.

A. Well, in the normal areas of inquiry, in that period of time that you are discussing, say, in the '65, '66, '67 area, this was normal.

Q. Am I to imply by your—I withdraw that. You say—what would happen in '68, '69, '70, '71, '72, and '73?

A. According to my Grand Jury testimony, I think that describes it.

Q. Well, what is it?

A. Up to 1970, '71, I really—I think. Yes. There was no reason, to my knowledge, not to, in the normal course of business, contact our competitors for credit information.

Q. And subsequent to that time, there was a reason?

A. The Legal Department, our Legal Department's advice, that it was a possible problem due to the Container [7414] case handed down, and, until that was clarified, it might not be to our best interests to contact our competition regarding extended terms.

Q. When you got that——

A. Now, that's not overdue terms. I am talking about extra terms.

Q. Extra terms, that's right. Now, who gave you this advice?

A. Our Legal Department.

Q. Who?

A. I don't recall. No, I don't.

Q. All right. Did you ever see this advice in writing?

A. No, sir.

Q. What did you do, if anything, after you got this information from your Legal Department?

A. As near as I can recall, I telephoned my regional managers. I think it was in 1971.

Q. All right. Did you subsequently issue a written directive instructing them to stop?

A. Yes, sir.

Q. When was that?

A. 1972.

Q. Why did you do that?

A. One of my regional managers, of which I cannot [7415] recall, had—it came to my attention that he had done this, and so I felt it was time to put it down so everybody could see it.

Mr. FRICANO. May the witness have 1011, please? While he is getting that, I will just offer that exhibit.

Mr. MCSWEENEY. No objection.

The COURT. Admitted.

[Government Exhibit No. 1011 for identification was received in evidence.]

By Mr. FRICANO:

Q. Now, 1011 is the letter to which we just had reference, is it not?

A. Yes.

Q. And it is dated January 19, 1972, addressed to "All Regional Credit Managers; Subject, Competition," with a copy to R. Thompson.

> From this date forward, no one is to contact our competition to determine if they are extending "extra terms" to anyone, in particular or in general.
>
> We will continue discussing the "normal" [7416] credit information with competition, but never anything other than this.

Signed, "H. D. Jarrett."

Who is Mr. Thompson?

A. Richard Thompson was vice president of the Legal Department.

Q. Is he sitting back there?

A. Yes, sir.

Q. Right here, the gentleman next to Miss Conlon.

Do you recall when your Legal Department, whoever it was, told you to stop the practice, did he mention—I assume it was a "he." It might have been a "she," though.

A. Unfortunately, it was he.

Q. Did he or she—did he—did this person indicate to you the date that the Container decision was handed down by the Supreme Court of the United States?

A. No, sir.

Q. Do you know that the date was in February of 1969?

A. Had no idea.

Q. Would you please identify, if you would, the persons with whom, at your competitor companies, you had contacts and exchanges with respect to extra terms?

A. Dick Croak, United States Gypsum; Bob Barber, National; Dick Davis, J-M.

Q. I am sorry. I didn't catch that last one.

[7417] A. Dick Davis, J-M; Roy Garby, Flintkote; and—well, there is another one, there.

Q. Harold Lockwood?

A. Yes, Harold Lockwood, and——

Q. Georgia-Pacific?
A. No—don't recall that.
Q. Do you know Mr. Tamblyn?
A. No, sir.
Q. Do you know Mr. Joe Kelly?
A. No, sir.
Q. Mr. McDaniels?
A. No, sir.
Q. Did you ever have any telephone conversations with any of the sales people at Georgia-Pacific like Mr. A. L. Meyer or Mr. Sikes or Mr. McCaskill?
A. I do not know any of those gentlemen.
Q. Or Mr. Burch?
A. Don't know them.
Q. Do you know whether or not any of your regional people were contacting Georgia-Pacific?
A. I do not know that.
Q. Were they empowered to?
A. Yes, sir.
Q. Anyone from Kaiser?
A. I don't recall that.

• • • • •

[7425] Q. • • • Now, going forward. Back to 1009.
Sometimes I have to go backwards to go forward.
Now, that is dated February 10, 1971. But, if you turn to the next page there is a handwritten note by Mr. Reth; is there not?
A. Yes, sir.
Q. And that states:

> Phoned U. S. G. Terms not competitive. In addition, customer not performing.

And he dates it February 8, 1971.
Now, that was also sent to you; was it not?
A. Yes. To write the covering letter.
Q. Now, this would have been after the time that you told them to stop; wouldn't it? Or, maybe you are mistaken as to when you told them when to stop?
A. That's not necessarily so.
Q. Well, I am trying to find out, sir.
A. You will recall Exhibit 1011, I had written a letter as described previously about stopping this.
Q. Yes, sir.
A. That was virtually a year later.

Q. That's right. But I am talking about your earlier testimony now when you said you advised the five regional credit managers that they should stop. And I believe you testified that that was in 1970 or '71.
[7426] A. In 1971.
Q. Well, do you recall when in 1971?
A. No.
Q. All right.
Do you recall at the time that you advised them to stop, did you also advise Mr. Reth to stop, your assistant?
A. I would have done so, but I didn't necessarily not. It could have well have been later on in the year in '71.
Q. Can you translate this note for us?
A. The handwritten note?
Q. Yes. I mean because it is in technical language. I mean, your credit language. So that we can understand.
A. Mr. Reth appears to have phoned United States Gypsum. Terms of sale, not competitive.
Q. What is that?
A. In other words, we were apparently doing business with this particular customer on an extended basis wherein U.S.G. was not. And the form here indicated that this was so. In other words, that U.S.G. was extending the terms.
Q. So that was incorrect information?
A. It turned out to be apparently.
Q. I am sorry, excuse me. I didn't mean to interrupt you.
A. Okay.
[7427] And to go on, it says "the customer is not performing."
Q. What does that mean?
A. In other words, he was not paying within the extended terms of sale.
Q. Now, did you make any business adjustments at Celotex as a result of that telephone conversation?
A. I never made the phone call.
Q. Well, I know. But, did you make a business judgment based upon that information that you got from United States Gypsum?
A. Of reducing terms?
Q. Yes, sir. Take a look at your cover letter.
A. Yes.
Q. You did?
A. The letter.

Q. Well, you are just a little bit too cryptic, Mr. Jarrett.

Did you, based upon Mr. Reth's telephone call to United States Gypsum, tighten up on your credit terms to this customer?

A. Yes. And plus the fact the man was not paying us.

• • • • •

[7428] Q. 1010, please.

A. I have it.

Mr. FRICANO. I offer this exhibit.

Mr. MCSWEENEY. No objection.

The COURT. Admitted.

[Government Exhibit No. 1010 was received in evidence.]

By Mr. FRICANO:

Q. It is dated February 10, 1971 for your signature, and it is very similar to 1009, another delinquent account situation; is that correct? Or, a tightening up on credit terms, excuse me.

A. I could not make that judgment. Oh, I am sorry. I didn't see this.

Q. The little buckslip note on the back?

A. I didn't see the buckslip. This would appear to be the same situation.

[7429] Q. Mr. Reth made another check with the competition; did he not?

A. Yes, sir.

Q. And that is dated February 8, 1971; correct?

The COURT. What are these checks of competition? To find out whether somebody is paying their bills or not?

The WITNESS. No, sir. In these instances, to determine whether or not we had a competitive situation.

The COURT. All right.

• • • • •

[Government Exhibit No. 1017 was received in evidence.]

By Mr. FRICANO:

Q. Now, this is a document dated February 2, 1971, and that is your handwriting down at the bottom; isn't it?

[7430] A. It is.

Q. And the competitive situation that you were faced with here was against the Kaiser Gypsum Company and National Gypsum Company; was it not?

A. Yes, sir.

Q. And does this note not indicate that you checked with them to see whether or not it was a competitive situation?

A. National Gypsum only.

Q. All right, sir.

How did you conclude it was National Gypsum only?

A. Because I never called Kaiser.

Q. Okay, sir.

And that's dated February 3, 1971; is it not?

A. Yes, sir.

Q. And that handwritten note says, does it not; "Confirmed deal."

A. Yes, sir.

• • • • •

[7437] Q. Now subsequent to this approved list being put together, did you ever at the time of a price change or at the time of the fast 5 put together a similar list?

A. Not to my knowledge.

[7438] • • •

Q. And did you stop extending any deviations from the new terms and conditions of sale offered to customers subsequent to March 1, 1966?

[7439] A. I tried, but it didn't work.

Q. You mean you weren't 100 per cent successful?

A. No, sir.

Q. How successful were you, sir?

A. It would be hard to—in percentage, I couldn't tell you that.

Q. Would it be the exception—let's put it that way—where there were deviations from terms and conditions——

A. We have always had exceptions and deviations from our standard terms, from our standard terms of sale.

Q. To special accounts?

A. What do you mean by special accounts?

Q. Big accounts.

A. Not necessarily.

Q. Not necessarily, that must mean yes.

A. Not so.

Q. Did you have deviations from your standard terms and conditions of sale subsequent to March 1 to certain of your selected key accounts?

A. Not necessarily.

Q. Would you explain your answer?

A. It depends upon marketing, if you wish to have in a geographical location any customers, any customers, with extended terms, that is what took place. It wouldn't make any difference whether he was the largest or the [7440] smallest.

* * * * *

[7441] * * *

Q. Throughout your testimony in your own mind you're excluding the 13 western states?

A. No, sir.

Q. You are not?

A. I am sorry. We are talking about gypsum, aren't we?

Q. Didn't I just ask——

A. Allow me one mistake.

Q. No comment.

* * * * *

[7457] * * *

Q. Now, 1008 is also dated February 1, 1966, and it is from you to the same people as the document we just discussed, 1007, is it not?

A. Yes.

Q. Now, it deals with the same subject matter, does it not, extended credit terms?

A. Yes, this is very difficult for me to read.

Q. Well, it is very difficult for me to read too, and I don't have a facsimile, but why did you send out two letters to the same people dealing substantially with the same subject matter, Mr. Jarrett?

A. It appears to me to be a continuation, and in depth and more detail.

Q. Now, was this done in anticipation of the new terms effective date of March 1, 1966?

A. I would think not.

Q. Is it that you are answering me no, sir, or that you don't have a recollection?

A. I answered the question the best I know how.

[7458] Q. Well, quite frankly I don't understand your answer. Maybe the Court does, but I do not.

Mr. DeLone. I object to that comment, sir. That is not a question. If Mr. Fricano has a question, I think he should interrogate the witness.

The Court. Ask a question, and we will see what the answer is, if you don't understand the answer.

By Mr. Fricano:

Q. What do you mean by "I would think not"? You are using the subjunctive tense which throws me off.

A. I do not think that has anything to do with the new set of terms.

Q. Then you are guessing and you are speculating?

A. No, I don't think so.

* * * * *

[7472] Q. Is it fair to state, Mr. Jarrett that extended credit, when granted, is a competitive factor in the marketplace?

A. Could you possibly rephrase that?

Q. Well, if one competitor, such as Celotex, grants extended terms, or offers extended terms, or grants it—as the case may be—to a customer which also buys from one of your competitors, does that create a competitive situation between Celotex and its competitor?

A. It would.

[7473] Q. Then is it fair to state that the granting of extended terms to customers in the marketplace creates competitive situations?

A. It would.

Q. Is it also fair to state that, when extended credit terms are granted to a customer, they represent a cost saving to that customer?

A. Yes, if he is able to pay within those terms.

Q. Now, could you describe to us of what value it was to you in contacting a competitor concerning extended credit?

You recognize the question, I hope.

A. Yes. It is of a situation to contact, to make such a contact to determine a competitive situation, for the simple reason that if there is no competitive situation and these terms are granted, it could well be construed as discrimination, and we would not want to be involved.

Q. Now, you didn't answer that question that way before the Grand Jury, sir; did you, sir?

A. I don't recall.

Q. Now, at page 4702, line 16, to the bottom of the page, and extending over to 4703, you were asked this question, same question, and gave this answer.

The COURT. Did you not?

Mr. FRICANO. "Now, could you describe [7474] to the Grand Jury of what value——"

The COURT. Now, "did you not," Mr. Fricano.

Mr. FRICANO. Oh. Did you not?

I am sorry.

> Now, could you describe to the Grand Jury of what value contacting a competitor was to you in performing your job?
>
> Answer: Yes. It basically was a matter of making a determination whether or not we wished to be competitive, and if we were not able to determine whether or not the situation was, indeed, competitive and if, indeed, it was not and we could not confirm this or had the ability to do so, we might find ourselves extending an extra period of time for the extension of credit. Therefore, it takes that extra period of time to bring in the dollars. That is the role of the dollars, which is important, because the longer somebody has our dollars, the more difficult it is for us.
>
> By Mr. FRICANO:

Q. Was that your testimony, and is it true today?

A. That was my testimony.

Q. Is it true today?

[7475] A. What I said?

Q. Yes, sir.

A. It is true in the context that it was written or, I mean, reported.

Q. And, in that answer, you did not mention, did you, discrimination at all?

A. No, I didn't.

Q. Now, in the last part of that answer, you stated it would be more difficult for Celotex because of the dollars, which were important.

In what respect would it be more difficult for you?

A. We would have outstanding more money for a longer period of time, which would not be useful to us.

Q. And that would cost you money; wouldn't it?

A. Yes, sir.

Mr. FRICANO. I offer 2127 and 3079.

Mr. MCSWEENEY. Would you give us those numbers again, please?

Mr. FRICANO. 2127 and 3079. And, with that offer, I will conclude my direct examination—or, excuse me, with the ruling on the offer.

The COURT. I am waiting until they get a chance to look at it.

Mr. MELLOTT. If the Court please, [7476] may I approach the witness and take a look at Government Exhibit 3079, please?

The COURT. Go ahead.

Mr. FRICANO. I will give you a copy, Mr. Mellott.

Mr. MELLOTT. Thank you.

Mr. MCSWEENEY. No objection to 3079.

With respect to 2127, we object on the grounds that there is no identification made of the handwriting. It is a handwritten document, largely.

The COURT. All right. The first exhibit is admitted. What's the number of it?

Mr. MCSWEENEY. 3079.

The COURT. All right.

[Government Exhibit No. 3079 for identification was received in evidence.]

The COURT. Let me see the second one.

Mr. FRICANO. And I will represent to the Court that, when this document, 2127, was obtained, pursuant to subpoena duces tecum, from the Celotex Corporation, it was as it is in Your Honor's hands right now. We haven't added anything to it.

[7477] The COURT. All right. I will admit the exhibit.

* * * * *

CROSS EXAMINATION

[7486] Q. From time to time, Mr. Jarrett, did you receive some advice from the Celotex Legal Department with respect to the requirements of the Robinson-Patman Act regarding discrimination among or between different customers?

Mr. FRICANO. Objection, irrelevant, immaterial, beyond the scope.

The COURT. You may proceed.

The WITNESS. Yes, I did.

By Mr. McSWEENEY:

Q. You did.

And you testified before the Grand Jury and referred to having received advice from the Legal Department concerning the Robinson-Patman Act, did you not?

A. Yes, I did.

* * * * *

[7507] * * *

DORIS ANDERSON

DIRECT EXAMINATION

By Mr. ROSEN:

Q. Miss Anderson, by whom are you employed?

A. Fibreboard Corporation.

Q. And in what capacity?

A. Assistant to the vice president and secretary.

Q. And how long have you held that position?

A. Ten years.

[7508] Q. And during the course of your employment at Fibreboard, did you have occasion to participate in the production of documents pursuant to Grand Jury subpoenas received by the Fibreboard Corporation?

A. Yes.

Q. What were your duties in connection with that production?

A. General supervision of the search of documents.

Q. Did you have overall charge of that search?

A. Yes.

Q. During the course of that, of those duties, did you have a chance to become familiar with, and also during the course of your employment at Fibreboard, have you had a chance to become familiar with the records of the Fibreboard Corporation and the files in which those records are kept?

A. Yes, I have.

Q. All right. Before you, to the right side, in manila folders, you will see a series of documents. I am going to ask you some questions on them.

The first document is Government Exhibit 343. I ask you to look at it and tell me if you recognize it.

A. Yes.

Q. What is it, please?

A. It is a Fibreboard report on competition.

[7509] Q. All right. I will ask you to look at the attachments to it, please.

A. No attachments—oh, one, yes.

It is a memo, a transmittal slip from someone employed in our Gypsum Division, to Mr. O. C. White.

Mr. ROSEN. I offer the document, Your Honor—excuse me. I will withdraw that.

By Mr. ROSEN:

Q. Was this document produced by the Fibreboard Corporation?

A. Yes, it was.

Q. And was it made, maintained, and kept in the ordinary course of Fibreboard's business?

A. Yes.

Mr. ROSEN. I offer the document, Your Honor.

The COURT. Voir dire?

Mr. McSWEENEY. Voir dire, if the Court please.

VOIR DIRE

By Mr. McSWEENEY:

Q. Miss Anderson, on the second page of 343, there is some handwriting. Do you know whose handwriting it is?

A. Are you talking about the back page of that report?

[7510] Q. Is that the back page? I have a Xerox.

A. Yes. It is numbers 00392.

Q. Yes. I am talking about the back page.

A. No. I do not recognize that handwriting.

Q. And you don't know when it was put there, do you?

A. No.

Mr. McSWEENEY. That's all I have.

Mr. ROSEN. If Your Honor please, I will represent that all handwriting on any of these documents were on the documents when they were produced to us.

The COURT. Are these documents to be used eventually as the basis for certain summaries that will be offered?

Mr. ROSEN. Not these particular documents, Your Honor. Oh, some of them will be used for basis of summation, though.

The COURT. When I said summaries, I am talking about charts or graphs or anything like that.

Mr. ROSEN. Not these particular documents. Some other ones will, Your Honor, that we will be getting to in a few minutes.

The COURT. And it is the Government's representation that the handwriting was on the document when [7511] it was delivered to the Government.

Mr. ROSEN. Yes, Your Honor.

The COURT. From the files of Celotex as testified——

Mr. ROSEN. Fibreboard.

The COURT. Fibreboard, as testified to by this witness?

Mr. ROSEN. Yes, Your Honor.

The COURT. It is admitted.

[Government Exhibit No. 343 for identification was received in evidence.]

Mr. MCSWEENEY. I did voir dire. I want to make an objection on the basis——

The COURT. I understood that you were objecting.

Mr. MCSWEENEY. Thank you, Your Honor.

The COURT. And I am admitting the document on the basis stated.

DIRECT EXAMINATION (RESUMED)

By Mr. ROSEN:

Q. In order to save time, Miss Anderson, I would ask you to look at the following documents, all at one time: Government Exhibits 473, 2095, 2097, 2103, 2104, 2105, 2106, 2110, 2111, 2144, 2145 and 2146 and 238. Would [7512] you look at all those documents, please?

A. All right.

Q. Do you recognize those documents as coming from the files of Fibreboard Corporation?

A. Yes, I do.

Q. And do you recognize those documents as having been made, maintained, and kept in the ordinary course of Fibreboard's business?

A. Yes.

Mr. ROSEN. I offer those documents, Your Honor.

Mr. MELLOTT. Some voir dire, Your Honor.

VOIR DIRE

By Mr. MELLOTT:

Q. Would you please get in front of you Government Exhibits 2144, 2145, and 2146, please?

A. Yes.

Q. Do you know whether those documents were ever mailed to the trade or published to the trade, any one of them?

A. No, I do not.

Q. Do you know—strike that. Am I correct that in each of those documents there is a reference to an [7513] attached list?

A. Right.

Q. And is the attached list attached to any one of these three documents?

A. No.

Mr. MELLOTT. If the Court please, I object to the admission of these documents in evidence. The witness doesn't know whether they were published, and, obviously, they are not complete.

Mr. ROSEN. Your Honor, I ask you to look at the documents, please.

The COURT. I am going to look at them.

Mr. ROSEN. Thank you.

Mr. MCSWEENEY. I have a question on one of those, on another point.

The COURT. Oh, all right. Let me look at these first, please. [7514] The COURT. What is the relevancy of these documents?

Mr. ROSEN. The relevancy of the documents, Your Honor, is to show that on the date indicated on the document Fibreboard announced what they purport on the front page of the document. I don't want to characterize it until it is in evidence.

Mr. MELLOTT. It seems to me, Your Honor, the attached list is important for that same purpose. To just offer a portion of the total document, I object to it, Your Honor.

The COURT. Is it offered solely to show some change was made on a particular date, and not what the change was?

Mr. ROSEN. That is correct, Your Honor, to show they announced what they purport to state.

Mr. FRICANO. May have just a minute, Your Honor.

Mr. MELLOTT. There is also the point, Your Honor, that this witness has testified in response to my voir dire she doesn't know if these documents were ever sent out.

Mr. ROSEN. Your Honor, the attachment referred to on the price lists are going—price announcements—excuse me—price lists, are going to be [7515] offered also through this witness. Those price lists are going to be, as the Court has alluded to before, are going to be the basis for certain charts or summaries. These are not going to be the basis for charts or summaries.

The COURT. Those lists are part of this document, aren't they?

Mr. ROSEN. We don't know if they were submitted as attachments together when they were submitted to us. We have certain price lists which we are going to offer into evidence.

The COURT. Is there any evidence independent of the document itself to indicate what was referred to here was ever placed into effect?

Mr. ROSEN. Yes, Your Honor. During the course of this trial there has been testimony as to dates of certain price increases. This document supports that testimony.

Mr. MELLOTT. Not by Fibreboard, I don't believe, Your Honor.

Maybe before Your Honor rules on these, since there are several other documents which are of this same type on which I will have additional voir dire, which purports to be a portion of a price list or an internal price list, maybe Your Honor should reserve ruling.

The COURT. I will do that. I will [7516] reserve ruling until we hear something further.

Mr. MCSWEENEY. May I have some voir dire?

The COURT. Yes.

VOIR DIRE EXAMINATION

By Mr. MCSWEENEY:

Q. Miss Anderson, Government Exhibit 238——

The COURT. Will you speak a little louder, please?

By Mr. MCSWEENEY:

Q. That is not on one of the original forms, business forms of Fibreboard, is it?

A. No.

Q. And is all you know about it that you produced it?

A. That is right.

Q. You don't know anything else about it?

A. It has a Fibreboard stamp on the bottom and I cannot identify it.

Q. You can testify about it because you see the Fibreboard stamp on the bottom?

A. Right.

Q. Which was used in connection with producing it for the Government?

A. Right.

[7517] DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Miss Anderson, by placing the stamp, the stamp appearing in the lower right-hand corner, that does indicate it was produced by Fibreboard from its own files?

A. It indicates to me it was produced from Fibreboard files, yes.

Mr. ROSEN. I offer those documents, Your Honor.

Mr. MCSWEENEY. If the Court please, I object to No. 238.

The COURT. Let me see it.

238 is admitted.

[Government Exhibit No. 238 was received in evidence.]

[7518] Mr. MELLOTT. If Your Honor please, I have already stated my objection to 2144, 2145 and 2146. With reference to the other documents contained in this offer, other than 237, I object to the admissibility of each of those documents on the grounds—I object to this method of introducing them on the grounds it denies me the opportunity to cross-examine with reference to any purported information contained on any of those documents. The same type of objection I have made previously in this trial, Your Honor, to the same kind of documents. I do not object, obviously, on the grounds they didn't come from the files of Fibreboard.

The COURT. All right.

I will postpone ruling on the admissibility of these documents at this time.

Mr. ROSEN. Very well, Your Honor.

By Mr. ROSEN:

Q. Miss Anderson, in front of you, you will see a stack of papers and I would direct your attention to one particular stack which is numbered Government Exhibit 2726 through 2739. I would ask you to take a quick look at those documents.

A. 2726 to 2729?

Q. 39.

A. 39.

[7519] Q. Do you recognize those documents?

A. I do.

Q. What are they, please?

A. Price bulletins from Fibreboard Corporation.

Q. Were they maintained and kept in the ordinary course of Fibreboard's business?

A. Yes.

Mr. ROSEN. I offer the exhibits.

Mr. MELLOTT. May I have some voir dire, Your Honor?

The COURT. Yes.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Would you please look first at Government Exhibit 2725, please.

Do you have that in front of you?

A. Yes.

Q. Does the front page of that document purport to be and substantially the same form as Government Exhibits 2144, 2145 and 2146?

A. Yes.

By Mr. MELLOTT:

Q. With Government Exhibit 2735 there is an attachment, is there not?

A. Well, there is a paper clip on three pieces of paper here, yes.

Q. Well, the copy that I have has been attached. Those are not stapled together; is that correct?

A. That is correct.

Mr. MELLOTT. May I approach the witness, Your Honor, to see if they are the same as mine?

The COURT. Yes.

By Mr. MELLOTT:

Q. All right. Now, Government Exhibit 2735 is addressed, is it not, to our northern California customers?

A. Right.

Q. Now, isn't it correct that the document that is attached to that is entitled: "For Use By Company Personnel (Not for distribution to customers)"?

A. True.

Q. Do you know whether those two documents actually were attached together in your file?

A. No, I don't.

Q. Do you know whether the attachment is really the right attachment that belongs with the front page of this document?

[7521] A. No, I don't. I can only make an assumption from the date, but I do not know.

The COURT. What are the dates?

The WITNESS. On the announcement it says effective with shipments made on or after March 13, 1967, prices are changed, and the dates on the price list are effective March 13, 1967.

By Mr. MELLOTT:

Q. But the document attached is for internal use only, is it not?

A. That is correct.

Q. Do you know whether or not 2735 was ever published to the trade?

A. No, I do not.

Q. Do you know whether any of these other documents, Government Exhibits 2726 through 2739 were ever published to the trade?

A. No, I do not.

Q. As a matter of fact, each of those purports to be for internal use only, do they not, well, with the exception of 2732, 2733, 2734; is that correct?

A. Right.

Q. Am I correct?

A. You are correct.

Q. All right. Now, with reference to 2732, do you have a group of documents attached there, or just by clip?

A. Paper clip.

Q. Do you know whether the first page of that document was ever published to the trade?

A. No, I don't.

Q. And the documents that are attached to it again are some internal distribution documents, are they not?

A. That is right.

Q. Would you look at Government Exhibit 2733. Do you see that?

A. Yes.

Q. Do you know whether that was published to the trade?

A. No, I don't.

Q. Do you know whether it was the normal practice at Fibreboard to write a letter similar to 2144, 2145 and 2146 and also the first page of 2735 and attach the price list to that document?

A. I do not know.

Q. Would you look at Government Exhibit 2734. Do you know whether that was published to the trade?

A. No, I don't.

Q. Now, attached to 2734 you have a second page. On the one that I have there is a letter similar to the front page of 2735, and 2144 through 2146, is that correct? [7523] I do not mean identical in language, but only in format?

A. Correct.

Q. Do you know whether that was published to the trade?

A. No, I do not.

Q. Now, attached to that document there is also another internal distribution form, is there not?

A. Correct.

Mr. MELLOTT. If Your Honor please, I object to the introduction of these documents. I do not believe that a proper foundation has been laid.

Mr. ROSEN. Your Honor, it has been established that they were the business records of Fibreboard Corporation. The documents really speak for themselves, Your Honor. We made no representations the other way.

The COURT. The problem is what they say.

Mr. ROSEN. They are price lists, and we are offering them as such.

The COURT. Well, now, I am going to admit these documents in evidence. It will be for the jury to determine whether from all the other evidence and circumstances in this case they find that these were under the circumstances matters that were put

into effect, [7524] were given some efficacy, and what if any weight is to be given to those documents. This you should do from examining the documents and then bearing in mind the circumstances as to what occurred on or about the time, and determine what, if any, effect, or if you find that it is unlikely that they were ever given any effect. If you find from the circumstances they were more than that, you give them what effect you think they should have.

As to the documents that didn't have prices attached and concerning which I reserved judgment, I am going to admit them only for what is actually stated on the face of those documents, and, again, it will be for you to determine whether from the date what was going on at that time, what was going on in the industry, you find that these were to your satisfaction given efficacy.

Mr. MELLOTT. If the Court please, I have just a point of clarification. Do I understand that the documents which have been identified simply as internal documents certainly cannot be used or offered on any basis as a published price list of Fibreboard?

The COURT. Only for what it purports to be, and I said to the jury whether it is to be given any efficacy at all will have to be determined from them bearing in mind that it says they were internal documents.

[7525] Now, what effect should be given to those will be for the jury in the light of the general circumstances that were existent at the time of the date of those documents. I am certainly not ruling that internal documents marked for internal purposes only without any other evidence ever went out to the field or that the jury could possibly find that they did.

Mr. MELLOTT. That is the point I wanted to clarify.

The COURT. They certainly could not. The only thing they could consider is whether these, as business records, in the files were in light of all the circumstances given any efficacy in the matters at issue in this case.

Mr. MELLOTT. I understand your ruling now, Your Honor.

[Government Exhibits Nos. 2726 through 2739 were received in evidence.]

By Mr. ROSEN:

Q. Mrs. Anderson, would you look at documents 3525 through 3527 and also 3555.

Mr. McSweeney. Would you repeat the numbers, please.
[7526] Mr. Rosen. 3525 through 3527 and 3555.
Mr. Mellott. If the Court please, I make the same objection to these documents that I did with respect to the others. They are in the same type of category.
The Court. I am going to admit them subject to the same conditions that I did previously. They are similar documents.
[Government Exhibits Nos. 3525, 3526, 3527 and 3555 were received in evidence.]

By Mr. Rosen:

Q. Mrs. Anderson, there is another stack of documents in front of you, 3701 through 3711, and I ask you to examine those and see if you can recognize them.
Do you recognize them?
A. Yes, I recognize them.
Q. What are they, please?
A. They are variance requests.
[7527] By Mr. Rosen:
Q. Did they come from the files of Fibreboard Corporation?
A. They did.
Q. Were they made, maintained, and kept in the ordinary course of Fibreboard business?
A. Yes, they were.
Mr. Rosen. I offer the exhibits.
The Court. Any objection to these?
Mr. DeLone. We haven't seen these documents. I thought we had all of them, but these I just got notice of and haven't been able to locate them.
[Mr. Mellott hands documents to Mr. DeLone.]
Mr. Mellott. I have no voir dire on these, Your Honor.
Mr. DeLone. May I just look at one to get an idea of what we are dealing with?
The Court. Yes.
Mr. Mellott. I have no objection to those, Your Honor.
Mr. DeLone. I have no objection, sir.
The Court. They are admitted.
[Government Exhibit Nos. 3701 through 3711 inclusive were received in evidence.]
[7528] Mr. Rosen. Your Honor, we have one final document that I understand Mr. Mellott is willing to stipulate its authenticity. It is number 3677.

Mr. Mellott. What I indicated was I will not object to its admission in evidence, Your Honor.
The Court. All right.
Unless somebody else does object, it is admitted.
Mr. Rosen. I offer the document.
The Court. All right.
[Government Exhibit No. 3677 was received in evidence.]
The Court. Any further questions?
Mr. DeLone. That's another exhibit we have never seen, sir. I am sorry. They weren't in the group originally provided us by the Government. We just got a list here late this morning.
The Court. Do you want me to wait until you get a chance to look at it?
Mr. DeLone. Why don't you admit it, sir. If I find any problem with it later I might make a motion at that time.
The Court. All right.
Mr. Rosen. I have no further questions, [7529] Your Honor.
The Court. Is there any cross-examination of this witness?
[No response.]
The Court. I want the jury to remember that these documents have been admitted for a rather limited purpose. I suppose what I am saying is that they are conditionally admitted. They are conditioned on the finding by the—the first finding by the jury as the finders of the fact along the lines I stated, looking at the entire circumstances involved. And you must first determine that before you determine the efficacy of those documents.

• • • • •

JOHN P. OTTERSON, called as a witness and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:
Mr. Fricano. If Your Honor please, we will just identify the witness.

DIRECT EXAMINATION

By Mr. Rosen:
[7530] Q. Would you state your name and your residence address, please.
A. Yes. John P. Otterson. I live in Perrysburg, Ohio.

• • • • •

[7541] * * *

Mr. FRICANO. And I might point out to the Court only one thing, and only because Mr. Mellott has gotten to it.

The summaries which were produced to Mr. Mellott don't say "Published prices" on them, Judge. They say, "List prices."

Mr. MELLOTT. Well, if Your Honor please, what I thought they were referring to——

Mr. FRICANO. That's the trouble with Mr. Mellott. He thinks before we actually do.

The COURT. I don't want to discourage thinking, for goodness sake.

Mr. FRICANO. I don't want to discourage thinking, either. I just want him to think correctly.

Mr. MELLOTT. Thank you, Your Honor.

* * * * *

[7543] * * *

Mr. ROSEN. O.K., sir.

By Mr. ROSEN:

Q. By whom are you employed, Mr. Otterson?

A. Johns-Manville.

Q. How long have you been with Johns-Manville.

A. Twenty-four years.

Q. Have you been employed in what is know as their Gypsum Department?

A. At one period of time.

Q. What period of time was that, sir?

A. September, 1969 through June 30, 1972.

Q. During that employment within the Gypsum Department, did you have occasion to work on production of documents in pursuance to a subpoena issued by a Grand Jury?

A. Yes, I did.

Q. Did you supervise a production of documents?

A. Documents from Johns-Manville, for a period, I did.

Q. During those occasions, did you have occasion to familiarize yourself with the documents in the Gypsum [7544] Department and the files in the Gypsum Department?

A. I would say yes.

Q. All right, sir.

In front of you there is, to your right there is a large, very large stack of documents and I will ask you to examine them to yourself and while you are doing that I will read off the numbers of those documents in that stack: 37, 225 through 235 inclusive, 308 and 309, 678 through 680, 856 through 864, 866 through 868, 888, 923, 1110, 1132, 1145, 1146, 1190, 1226 through 1232, 1348, 1480, 1481 through 1498, [7545] 1732, 1824, 1826, 2147, 2185, 2196, 2206, 2216, 2226.

By Mr. ROSEN:

Q. All right, Mr. Otterson, before I ask you some questions regarding the documents you just examined, let me ask you generally what procedure did you and those working under you undertake in producing these documents?

A. We made an attempt to interpret the subpoena as to what items were required and arrived at a decision where we thought we could locate that type of information.

Q. Specifically for preparing the documents for submission, could you outline the procedures that were undertaken?

A. My recollection—as far as numbering the documents was concerned?

Q. Yes.

A. My recollection was in subpoena No. 1 we may [7546] have numbered each and every page.

Q. What about——

A. In subpoena 2, when we felt a number of items pertained to one another were fastened together in our files, we numbered one page out of that group of pages.

Q. Regarding the items that were fastened, did you find a number of items in the files that were fastened together in the files?

A. In here?

Q. Just generally in——

A. In our files?

Q. Yeah.

A. In our headquarters?

Q. Yes, sir.

A. Yes.

Q. Of those documents that you produced pursuant to subpoena, did you keep them fastened, if you found them in a fastened condition?

A. That was our intention.

[7547] By Mr. ROSEN:

Q. Have you had a chance to examine those documents?

A. Yes, sir, I have.

Q. Based on your duties in regards to the production of documents, your knowledge of the files and your work in connection with Johns-Manville Corporation, were these documents documents of the Johns-Manville Corporation?

A. Or one of its subsidiaries.

Q. Or one of its subsidiary corporations?

A. Yes.

Q. And were those documents prepared, maintained, and kept in the ordinary course of Johns-Manville's business?

A. They were.

Mr. ROSEN. I offer the documents, Your Honor.

The COURT. Any voir dire?

Mr. MELLOTT. Yes, Your Honor.

VOIR DIRE

By Mr. MELLOTT:

Q. Would the witness please look at Government Exhibit 862?

A. 862?

Q. Yes.

A. All right.

[7548] Q. And I direct your attention to the last page. Do you have any idea whose handwriting that is—strike that.

Do you have any knowledge as to whose handwriting that is?

A. I am not a handwriting expert. I would assume that it was the person who signed the wire. Does that answer your question?

Q. There is no name appearing on this third page, is there?

A. I am sorry. I am not looking, I guess, at the same document that you are looking at. 862?

Mr. ROSEN. Excuse me.

If Your Honor please, I think I can clear up the confusion.

The Xerox that Mr. Mellott has, the third page, is really a reverse of the second page. We had Xeroxed both sides of the page because of what was contained on there.

The COURT. All right.

By Mr. MELLOTT:

Q. Well, do you know whether those notes are Mr. Smith's, that appear on the reverse side?

A. I cannot say that.

[7549] Mr. MELLOTT. May the witness have Government Exhibit 1826.

The WITNESS. 1826?

The COURT. Do you think we ought to take them one at a time? We are going to lose track if we don't, aren't we? Is there any objection to that?

Mr. MELLOTT. On the other document?

The COURT. To that exhibit with the notes on the back.

Mr. MELLOTT. No, Your Honor, I don't object to that one.

The COURT. All right. Go ahead then.

Mr. MELLOTT. May I approach the witness again just so I can check the original exhibit, Your Honor?

The COURT. Yes.

By Mr. MELLOTT:

Q. I direct your attention to the last page of that exhibit. Do you know whose handwriting appears thereon?

A. I do not.

Q. Do you know from whose desk calendar that page was removed?

[7550] A. I do not know.

Mr. MELLOTT. If Your Honor please, I do object then to that particular page being attached to Government Exhibit 1826.

Mr. ROSEN. If Your Honor please, that was the condition in which that particular attachment or document came to us. We did not separate it because it did come to us in an attached condition.

The COURT. May I see it, please.

[An exhibit is handed to the Court.]

The COURT. May we not just remove that page? That is obviously Saturday and Sunday which was used for scrap paper.

Mr. ROSEN. Yes, Your Honor. That would be acceptable to us.

The COURT. All right. Then I will take it off and give it back to the Government.

All right. Let the record show that I have removed that page from the exhibit.

Mr. MELLOTT. All right, Your Honor.

I have no objection to it now.

The COURT. All right. It will be admitted, and the other exhibit, the previous one to which you had no objection, is also admitted.

Mr. MELLOTT. No, I am not finished, [7551] Your Honor. I still have a few more. I am sorry.

The COURT. You said to the one exhibit just before this, "I have no objection."

Mr. MELLOTT. Yes.

The COURT. That is the one I am admitting. What is the number of that?

Mr. MELLOTT. That was 862, Your Honor.

The COURT. All right. That is the one I am admitting.

[Government Exhibits Nos. 1826 and 862 were received in evidence.]

By Mr. MELLOTT:

Q. All right. Would you please look at Government Exhibit 1107.

A. 1107?

Q. Yes.

A. That is not in here.

Q. I am sorry. Maybe that wasn't in this list. I am sorry. That one wasn't in this list.

Would you look at 309, please.

A. 309?

Q. Yes.

[7552] A. O.K.

Q. Do you know, Mr. Otterson, whether that document was ever mailed to the trade?

A. I do not know.

Mr. MELLOTT. Your Honor, there are several that are in this same category, so I might just as well run through them.

By Mr. MELLOTT:

Q. I would direct your attention to——

Mr. ROSEN. If Your Honor please, in regards to this document, I believe Mr. Mellott's question was: "Was this ever mailed to the trade?" I would ask Your Honor to please examine the document.

The COURT. Well, I might as well examine them all together. He says there is quite a few just like that.

Mr. MELLOTT. They are documents as to which I have similar questions, and these all are somewhat related, Your Honor.

By Mr. MELLOTT:

Q. Would you look at Government Exhibit 1190, 1384, 2147——

A. 2147?

Q. Yes, and 2185, 2196, 2206, 2216——

A. I have no 2226.

[7553] Q. There is also a 2216, I believe.

A. 2216?

Q. Yes.

A. I beg your pardon. It is the same tab as the other.

Q. And 2226?

A. Got it.

Q. All right.

Mr. Otterson, do you know whether any of those documents were actually sent to the trade, published to the customers of Johns-Manville?

A. All right. I am prepared to answer that question.

[7554] By Mr. MELLOTT:

Q. Okay.

A. The following documents I cannot state one way or the other. I do not know.

Q. Which ones are those?

A. That would be the ones we pulled here. No. 309, No. 1190, 1384, 2147 and 2185.

To the best of my knowledge, the following were mailed to our customers: 2196, 2206, 2216, 2226. At least one of the two pages in the folder was mailed to the customer.

Q. All right.

And I assume that that last remark relates to Government Exhibits 2196, 2206, and 2226, since there is a document attached to the front of each of those exhibits which says, "For internal use only;" is that correct?

A. That is correct, sir.

Mr. MELLOTT. If Your Honor please, I believe some of the other defense counsel also have some voir dire. That's all I have at this point.

The COURT. All right.

Mr. MCSWEENEY. I have some questions.

Mr. ROSEN. Excuse me, Your Honor. Is this voir dire on these documents, or the other documents?

Mr. MELLOTT. I don't know.

[7555] Mr. MCSWEENEY. The documents that you are offering.

Mr. ROSEN. You mean the specific documents that Mr. Mellott has voir dired on?

Mr. MCSWEENEY. I think the questions will, in part, pertain to those documents as well as to others.

The COURT. All right, go ahead.

The WITNESS. Am I to keep these separated, now?

The COURT. Yes, please.

Mr. MCSWEENEY. Please.

VOIR DIRE EXAMINATION

By Mr. MCSWEENEY:

Q. You were in the gypsum department of your company only from September of '69 to June 30, 1972?

A. That is correct.

Q. Prior to that you had never had anything to do with gypsum wallboard products?

A. No. At one period in time I was a salesman and sold a little wallboard.

Q. When was that?

A. 1961, if I remember correctly.

Q. All right.

[7556] And what was your job in the Gypsum Department from September of '69 to June 30, 1972?

A. My title was Manager, Technical Services, Eastern Gypsum.

Q. You were not the custodian of the documents?

A. I can't think of who I would say was.

Q. Were you? I only asked about you.

A. I would say no.

Q. Now, I would like to ask you about a specific document, not one of those in that group. Do you want to hold onto that? Just one document, Government Exhibit 226.

First, if you will just clarify for me, are there two documents, or is one the writing on the back of the first?

A. This one is not stapled together at this particular time. It is two pieces of paper.

Q. Two separate pieces of paper?

A. Yes, sir.

Q. So, is that your handwriting on the handwritten piece of paper which is in handwriting?

A. No, sir.

Q. Do you know whose it is?

A. No, sir.

Mr. MCSWEENEY. I am going to object, but I will wait if anyone else has voir dire.

[7557] The COURT. Is there any other voir dire?

All right.

Mr. MCSWEENEY. May I have a moment on one more document, Your Honor?

By Mr. MCSWEENEY:

Q. Do you know, sir, whether the price changes that you said had been mailed or were sent to the trade in Government Exhibits 2196, 2206, 2216 and 2226 took effect?

A. I do not remember.

Q. You don't know then?

A. I do not know.

Mr. MCSWEENEY. That's all I have.

I could make a specific objection on the one document, No. 226, Your Honor. Not sufficient foundation, and no indication of evidence that they are related in any way.

Mr. ROSEN. Your Honor, may I ask the witness a couple of further questions in that regard?

The COURT. What did you want?

Mr. MELLOTT. If Your Honor please, I wanted to object to Government Exhibits 309, 1190, 1384, 2147, and 2185, on the basis that no proper foundation has been laid.

The COURT. Let me see the exhibits [7558] that you have objected to and the ones that Mr. McSweeney has objected to, Mr. Grainer.

The WITNESS. That is 226?

Mr. McSWEENEY. I will give you the ones I object to.

Government Exhibit 226.

And, if the following are offered for the purpose of showing the prices took effect, I would have an objection also to 2206, 2216, 2196 and 2185.

The COURT. All right.

Now let me see those and I will rule on those first. Then we will get to Mr. Mellott's.

Mr. McSWEENEY. All right.

Your Honor, I may have read one of those numbers wrong, and I would repeat them for clarity. 2196, 2206, 2216, 2226 as well as the other typed document.

226 I object to also. That's a different kind of document.

The COURT. All right.

On 226, the pink form, teletype message, I will admit it. The paper that was attached to it, the paper note, I am not going to admit it. It doesn't make any sense to me, so I am going to remove that and return it to the Government.

Mr. ROSEN. If Your Honor please. [7559] could I ask the witness a couple of questions in regard to that document?

The COURT. Well, haven't you asked your questions in regard to that document?

Mr. ROSEN. Well, I want to ask one further in answer to the voir dire.

The COURT. Go ahead.

DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Let me show you my copy, Mr. Otterson.

The COURT. You can show him the original if you want to.

By Mr. ROSEN:

Q. It is a copy of the document. Let me ask you, sir, to examine that.

First of all, could you, from examining the contents of those two documents, tell us if they don't in fact relate to the same subject matter?

Mr. McSWEENEY. Object to that. He wasn't in the department even at that time.

The COURT. Can you say that they do or don't relate to the same thing?

The WITNESS. I will say that I was not in the department. Now I will read them.

[7560] The COURT. All right.

The WITNESS. In my opinion they are related.

[7561] The COURT. All right, then, I will admit the document.

The jury has heard it. You have heard the testimony. You can examine it yourselves and reach your own conclusion as to whether they are related, as the witness has stated.

So 226 is admitted.

[Government Exhibit No. 226 for identification was received in evidence.]

Mr. DELONE. I hope Your Honor has noted the legend on the bottom of the first page of 226. Maybe yours is different than mine.

The WITNESS. My file list.

The COURT. Exhibit 2196 is admitted.

The jury will have to examine the document in relationship to all the surrounding circumstances in evidence in the case and reach your own conclusion as to whether it appears that this document ever did have a competitive effect in the market, and you can determine, perhaps, from other evidence, whether it is likely that this was sent out and did have an effect.

[Government Exhibit No. 2196 for identification [7562] was received in evidence.]

The COURT. 2206 is the same, and the same ruling applies. 2216 is also admitted, as is 2226, and, as I say again, the effect that you are going to give these documents will be for you to determine in relation to all the other evidence which you have heard concerning the same subject matter.

[Government Exhibits Nos. 2206, 2216, and 2226 for identification were received in evidence.]

The COURT. Now, Mr. Mellott.

May I have the ones of Mr. Mellott?

Mr. MELLOTT. Government Exhibit 309, 1190.

[Discussion was held off the record.]

Mr. MELLOTT. Do you have them all there, Mr. Grainer?

I didn't read them all off this time.

The CLERK. That's all that's left.

Mr. MELLOTT. There are five of them: 309, 1190, 1384, 2147, and 2185, all Government Exhibit numbers.

The CLERK. Right.

[7563] The COURT. 309 is admitted.

[Government Exhibit No. 309 for identification was received in evidence.]

Mr. MELLOTT. Your Honor will recall these are the ones the witness testified he didn't know whether they ever went out to the trade.

The COURT. 1190 is admitted.

1384 is admitted.

2147 is admitted.

And 2185 is admitted.

Again, you will examine those in the light of the other relevant evidence, other evidence in this case relating to these matters, to determine what effect you will give to the documents.

[Government Exhibits Nos. 1190, 1384, 2147, and 2185 for identification were received in evidence.]

The COURT. Now, there are other exhibits there, to which there were no objection; is that correct?

Mr. ROSEN. Your Honor, I will offer those exhibits that I read off the list.

[7564] Mr. MCSWEENEY: I will object to all exhibits which were dated prior to September of 1969.

Mr. MELLOTT. Well, if Your Honor please, I believe we have the standing objections that were made before on the hearsay connecting up points, and the Statute of Limitation points, but other than that——

The COURT. Yes. Well, all right. They will be admitted, subject to that objection.

Mr. ROSEN. Just so the record is clear, Your Honor, on the one exhibit, 862, in which the Court removed the last page, the document was admitted absent that last page?

The COURT. Yes.

Mr. ROSEN. Thank you, sir.

The COURT. All right, anything else?

Mr. ROSEN. Yes, sir. Yes, Your Honor. A few more documents. Now, Mr. Otterson, you can just hand those to Mr Grainer.

DIRCET EXAMINATION (RESUMED)

By Mr. ROSEN:

Q. Would you please look at Government Exhibit 36, which should be in a stack before you, and I will ask you to examine it, and ask you if that is the type of document that was kept in the files of Johns-Manville Corporation.

A. It is the type.

Q. All right. What is the name at the bottom of the [7565] document?

A. J. A. Marian.

Q. Do you know if he was an employee of Johns-Manville Corporation?

A. He was.

Mr. ROSEN. I offer the document, Your Honor.

Mr. MCSWEENEY. May I have a moment to see it?

VOIR DIRE

By Mr. MELLOTT:

Q. Mr. Otterson, did this document, Government Exhibit 36, come from the files of Johns-Manville?

A. I do not know. It is a single document, and it does not have our code.

Mr. ROSEN. If Your Honor please, I will represent——

The COURT. Off the record.

[Discussion was held off the record.]

Mr. ROSEN. If I may ask one question, Your Honor.

DIRECT EXAMINATION (RESUMED)

By Mr. ROSEN:

Q. Mr. Otterson, did every document that you submitted, to your knowledge, have a J-M identification number [7566] on it?

A. No. I have proved that.

Mr. ROSEN. On behalf of the Government, Your Honor, I will represent that this document was produced to the Government by Johns-Manville Corporation.

The COURT. But where it came from, you can't represent.

Mr. FRICANO. It was produced by the corporation.

Mr. ROSEN. I can only represent that it was produced by the corporation.

The COURT. There is an objection.

VOIR DIRE

By Mr. MELLOTT:

Q. Mr. Otterson, who is Mr. M. A. Butler? Do you know?

A. Mary Butler.

Q. Yes.

A. She was a chief clerk in the St. Louis District.

Q. All right. It says M. A. Butler on the document; doesn't it?

A. Yes.

Q. She was employed by Johns-Manville?

A. Yes, sir.

Mr. MELLOTT. Well, I have no objections, [7567] Your Honor, other than the regular objections I mentioned before, the standing objections.

The COURT. It is admitted.

[Government Exhibit No. 36 for identification was received in evidence.]

DIRECT EXAMINATION (RESUMED)

By Mr. ROSEN:

Q. Mr. Otterson, would you look, please, at Government Exhibit 865, referring you specifically to the third document there. Do you recognize the type of document that it is? Yes, sir, that one.

A. Yes.

Q. What is it?

A. It is a Johns-Manville teletype.

Q. All right. And, referring to the first two documents immediately preceding it, are those the type and form of documents that Johns-Manville maintained in the regular course of its business?

A. Yes.

Q. And what's the name at the bottom of each of those two documents?

A. J. A. Marion.

Mr. ROSEN. I offer the exhibit Your [7568] Honor.

VOIR DIRE

By Mr. MELLOTT:

Q. Mr. Otterson, would you look at the last page of that document? Yes, please. Do you know whose handwriting that is on that document, at the top?

A. The words, "No answered"?

Q. Yes.

A. No, I do not.

Q. Do you know whether this document or the three pages of this document were produced from the files of Johns-Manville?

A. They do not carry, any one of the three, carry our stamp, so I cannot say positively that they were.

Q. Who was Downing? I better not say "mister."

A. You were right, in this case. Mr. Downing is the district manager of the Cleveland District.

Q. For Johns-Manville?

A. For Johns-Manville.

The COURT. Any objection?

Mr. MELLOTT. I have no objection, other than the standing one, sir.

The COURT. Admitted.

Mr. MELLOTT. As I understand, I don't have to make that latter portion of that statement.

[7569] The COURT. You do not.

[Government Exhibit No. 865 for identification was received in evidence.]

[7570] DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Mr. Otterson, do you know a George Isaac or George Isaacs?

A. Not to my knowledge.

Q. Would you please look at Government Exhibit 1107.

First of all, directing your attention to the first page, the letterhead, do you recognize that letterhead, sir?

A. I do.

Q. What is it?

A. At that period of time it was a normal internal Executive Department bulletin.

Q. I direct your attention to the lower right-hand corner, to the writing in the lower right-hand corner.

Do you know what that is, sir?

A. It would appear to me to be a designation of a subpoena paragraph.

Q. All right.

Would you please turn to the last page of the document and there is a name that appears at the bottom of the document. What is that name, sir?

A. Herbert Morton Ball.

Q. Do you know who he is?

[7571] A. At that time he was general counsel.

Mr. ROSEN. I offer the document, Your Honor.

Mr. MELLOTT. Voir dire.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Mr. Otterson, directing your attention to the first page of this document, Government Exhibit 1107, which is the one I thought was included in the prior offer, could you tell me, please, whose handwriting appears in the upper left-hand corner?

A. I could not.

Mr. MELLOTT. If the Court please, I object to this document's introduction into evidence on the grounds of relevancy and materiality.

The COURT. May I see it, please.

The objection is sustained.

DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Mr. Otterson, would you please look at 1125.

Can you identify the form of that document?

A. It is a teletype message used for handwritten or typed before it is sent on the wire.

[7572] Q. Do you know, sir, if this was the type of form being used by Johns-Manville Corporation at that time?

A. It is.

Q. Do you know if it was the practice in Johns-Manville Corporation to write out in hand teletypes before they were sent to the field?

A. Some of the times; some of the time it is typed.

Q. What is the name that appears at the bottom of the note?

A. J. A. Marian.

Mr. ROSEN. I offer the document.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Mr. Otterson, I can't read the name at the top. Is it Apple?

A. Appel.

Q. Mr. Appel?

A. Mr. Appel.

Q. Is he an employee of Johns-Manville?

A. He was.

Q. In 1966?

A. He was.

Mr. MELLOTT. I have no objection, Your Honor.

[7573] The COURT. It is admitted.

[Government Exhibit No. 1125 was received in evidence.]

DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Would you look at Government Exhibit 1484, please.

A. 1484?

Q. I am sorry, sir. What is that last number that is there?

A. 1484.

Q. Is that it?

A. Yes.

Q. And can you identify the document?

A. Another handwritten teletype.

Q. This is the same form that was used at that time?

A. It was.

Q. What is the name that appears at the bottom?

A. E. C. Smith.

Q. To your knowledge, was he an employee of Johns-Manville at the time?

A. He was.

Mr. ROSEN. We offer the document.

[7574] Mr. MELLOTT. May we have a moment?

I believe that is already in evidence.

Mr. ROSEN. I am sorry, Your Honor. Mr. Mellott is absolutely correct.

By Mr. ROSEN:

Q. Is there a folder up in front of you containing a number of documents within one folder, sir?

The COURT. Gentlemen, look at that exhibit number again. The Courtroom Deputy does not have it marked as an admitted exhibit and everyone else seems to think it is.

The WITNESS. 1484 it says on the sticker.

The COURT. If it is not admitted, is there any objection?

Mr. MELLOTT. I thought he included it in the original list 1480 through 1498 and I assumed this was covered.

Mr. GRAINER. It may have been today.

The COURT. Was it admitted, then, Mr. Grainer?

Mr. GRAINER. I have so many lists here from today, wait a minute.

Yes.

The COURT. All right. It was [7575] admitted.

The WITNESS. This one——

By Mr. ROSEN:

Q. Is there a folder in front of you with documents beginning with the number 2740 and a very thick folder of documents?

A. No.

The COURT. There is no thick folder of documents there.

Mr. ROSEN. If Your Honor please, in order to facilitate the testimony of Mr. Otterson on certain points, I have another witness to call from Johns-Manville and I would like to excuse Mr. Otterson at this time, so he may examine certain documents, and recall him after the conclusion of Mr. Otterson's testimony.

The COURT. You lost me there. You want to excuse Mr. Otterson and recall him after the conclusion of his own testimony?

Mr. ROSEN. At the conclusion of Mr. Walters' testimony, who is another authentication witness.

The COURT. Is there any objection?

Mr. MELLOTT. No, Your Honor.

The COURT. All right. You may step down and examine the documents.

[7576] • • • • •

NORMAN E. WALTERS, called as a witness, and having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified on his oath as follows:

By Mr. ROSEN:

Q. Mr. Walters, by whom are you employed?

A. Johns-Manville Sales Corporation.

Q. How long have you been with Johns-Manville Corporation?

A. A little light of four years.

Q. All right, sir.

During that time were you employed in the Gypsum Department of Johns-Manville?

A. Not directly.

Q. In what capacity were you employed with Texas Gypsum?

A. I was administrative assistant to the vice president Architectural and Engineered Products Division.

Q. During the course of your duties in Johns-Manville [7577] did you have occasion to prepare for production certain documents of Johns-Manville Corporation in answer to a subpoena issued by a grand jury?

A. I submitted documents.

Q. During the course of that submission, did you have a chance to become familiar with the documents and files of the Gypsum Department of Johns-Manville Sales Corporation?

A. I became familiar with the filing system, yes.

The COURT. Just a moment.

[Discussion off the record.]

By Mr. ROSEN:

Q. Mr. Walters, before you is a stack of documents that are numbered GX 38, 1015, 1407, 1408, 1409, 1410.

A. Yes.

Q. I will ask you please to examine those documents at this time.

A. I have examined them.

Q. Can you identify them, sir?

A. Yes. They were included in our submission on the subpoena.

Q. Did they come from the files of Johns-Manville?

A. Yes.

Q. Were they prepared, maintained and kept in the ordinary course of Johns-Manville business?

[7578] A. Yes.

Mr. ROSEN. Your Honor, I offer the documents.

Mr. MELLOTT. I have some voir dire on one document.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Would you locate——

The COURT. The jury may wonder, and as I have said, I like to keep you advised as we go along what is happening insofar as I am able to do that. When documents that are evidence are offered, there has to be a witness, unless the document is submitted on stipulation or agreed to as to authenticity a witness has to testify as to where that document came from and answer questions concerning it before we can make that available to you as evidence. So that is what we are doing now.

Go ahead, Mr. Mellott.

By Mr. MELLOTT:

Q. Would you please look at Government Exhibit 1015. Do you know who was the author of that document?

A. I believe this is one that is not signed and I do not know who the author is.

Q. Do you know what the date of the document——

[7579] A. I do not.

Q. —is?

A. No.

Q. There is no date appearing——

A. No.

Q. —on it in any way?

A. No, as far as the date of draft.

Q. There is no date appearing on the exhibit, is there, indicating when it was prepared?

A. I see no date on the exhibit.

Q. There is some dates appearing in the body of the exhibit, however?

A. Yes.

Q. You do not know whether this document was prepared on or about the dates that are referred to in the body of the exhibit, is that correct?

A. That is correct.

[7580] By Mr. MCSWEENEY:

Q. Mr. Walters, I don't think I got when you were employed by Johns-Manville.

A. June, 1971.

Q. That is your first employment with the company?

A. Yes.

Q. And you are not the official custodian of these exhibits which have been shown to you?

A. No.

Q. And from June, 1971, to December 27, 1973, have you been the assistant to the vice president, Architectural and Engineering Department?

A. I believe your date—your latter date is incorrect.

Q. Well, I am not asking for anything beyond that date, just that you were, during that period of time, in the job you mentioned?

A. No, I had another job.

Q. What was the other job, and what date?

A. That is my current job. I am manager of Information and Operations for the same department.

Q. When did you commence that other job?

A. I believe it was in February of 1973.

Mr. MCSWEENEY. I have no more voir dire on anything else.

[7581] The COURT. Does anybody else have any more voir dire?

So far there have been no objections to any of these exhibits.

Mr. MELLOTT. Your Honor, I do object to Government Exhibit 1015 on the ground that an improper foundation has been laid.

The COURT. May I see that one, please.

[The Court looks at an exhibit.]

• • • • •

The COURT. 1015 is admitted.

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[7585] By Mr. ROSEN:

Q. Mr. Walters, before you you have Government Exhibits 2800 through 2817. Have you had an opportunity to examine those documents?

A. I have.

Q. Can you identify them?

A. I can identify them as submission on the first subpoena with the exception of the handwriting on the document.

Q. Did those documents come from the files of the Johns-Manville Corporation?

A. They did.

Q. And were they prepared and maintained in the ordinary course of business?

A. They were.

Mr. ROSEN. I offer the documents, Your Honor.

Mr. MELLOTT. I have some voir dire, Your Honor. First may I say 2800.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Mr. Walters, do you know whether all of these documents, Government Exhibits 2800 through 2817, were published to the customers of Johns-Manville?

[7586] A. I have no knowledge of that.

Q. Do you know whether any of them were published to the customers of Johns-Manville?

A. I have no knowledge of that.

Q. Looking at Government Exhibit 2800, was that handwriting on there when it was produced to the Government? Do you know?

A. I have no knowledge of that without the original documents, and relating that to my copies in Denver.

A JUROR. I can't hear him. The mike is not on.

The COURT. Is that mike on?

The WITNESS. I think it is on. It is just far away.

By Mr. MELLOTT:

Q. Well then, I assume you do not know whose handwriting that is?

A. I do not.

Q. All right, sir. Now, would you look at Government Exhibits 2803, 2804, 2806, 2808.

Am I correct that those documents would appear to be for the internal use only at Johns-Manville?

Mr. ROSEN. Objection, Your Honor. The documents speak for themselves. This witness has already testified he had no

knowledge as to what the [7587] effect was of any of the documents.

The COURT. Well, does it say on it "for internal use only?"

Mr. MELLOTT. I will reframe the question, Your Honor.

By Mr. MELLOTT:

Q. Looking at 2806 first. Am I correct that it says, "For internal use only."

A. That is correct.

Q. At the top, "Not to be circulated to customers."

A. That is correct.

Q. And on 2803, 2804 and 2808, aren't these documents also addressed to various offices of Johns-Manville rather than to customers?

A. 2808 is addressed to—not only by name, but by location, to plants of ours and to offices of ours. Where there is no address on 2808, I cannot tell you. But those, of course, that were San Francisco office is SFO. Las Vegas and so forth, are our plants. Others I do not know.

Q. You do not recognize the names, people at the top of that document?

A. Not all of them.

Q. Of all the ones that you do recognize, are they all Johns-Manville employees, or were they on April 3, 1968?

[7588] A. I was not with the company then, and I do not recognize the names in all cases.

Q. All right, sir. Now, would you look at Government Exhibits 2812, 2814, 2815, and 2816.

A. 12, 14 and 16?

Q. Yes. 12, 14, 15 and 16. 2812, 2814, 2815 and 2816.

A. I have them.

Q. Am I correct that each of those documents indicates that it is for internal distribution only?

A. It so states.

Q. Referring to the entire group of documents, 2800 through 2817, Mr. Walters, do you know whether there were any other documents attached to those documents in the files of Johns-Manville, or to any of those documents?

A. I do not know for sure.

Mr. MELLOTT. That's all I have, Your Honor.

I would object to them on the ground that no proper foundation has been laid.

The COURT. Now, you will recall that I am going to admit these documents, other similar documents you will.

Whether a document was circulated outside or inside isn't the important factor. The question is: Was it? Does it have any probative value as to any matter here [7589] at issue, which I will define, of course, when it comes to my final charge. And that is concerning the charge made that there was an unlawful agreement in restraint of trade. And whether or not these documents affected that will be for you to determine on looking at the document and on considering the other matters that you have heard here, the overall testimony that has been offered in the case. You will have to determine what they do, what effect they do have, and you will determine what they prove, if anything.

Mr. MELLOTT. If the Court please——

The COURT. Now as to whether or not something else could have been attached to it, well, I don't know whether—Any document you could ask "Was there anything else attached?" Maybe it was and maybe it wasn't.

But the question is this: The reason I am admitting them is these came from the files of this corporation, were maintained in the ordinary course of business, and you can consider all those factors in determining what effect they had.

Mr. MELLOTT. If the Court please, I believe that is possible that the question of whether they were circulated inside or published to the trade may well become a significant factor, and that's the reason [7590] I am asking the questions.

The COURT. You can argue. All I am saying is that right now in my determination as to the admissibility, that doesn't affect my determination.

And I have told the jury that they will consider all such factors in passing on the document. That's what I attempted to tell the jury. It isn't for me to say. That's their decision.

Mr. MELLOTT. All right, Your Honor. Thank you.

[Government Exhibits Nos. 2800 through 2817 inclusive were received in evidence.]

The COURT. Any further questions?

[No response.]

The COURT. You may step down, sir.

[Witness excused.]

Mr. ROSEN. Your Honor, we'd like to recall at this time Mr. Otterson, please.

The COURT. All right.

JOHN P. OTTERSON resumed the stand, and having been previously sworn, was examined and testified further as follows:

[7591] REDIRECT EXAMINATION

By Mr. ROSEN:

Q. Mr. Otterson, before you there is a series of documents, Government Exhibits 2740 through 2799, Nos. 2818 through 2849. And, Nos. 3506, 3556 and 3557.

I will ask you if you have seen those documents before and can you identify them?

A. I have seen them before and I can identify them.

Q. What are they, sir?

A. Items submitted on subpoena No. 1.

Q. Were they documents submitted by the Johns-Manville Corporation?

A. Or one of its subsidiaries, yes, sir.

Q. One of its subsidiary corporations?

A. Yes.

Q. Were they prepared and maintained and kept in the ordinary course of Johns-Manville's business?

A. They were.

Mr. ROSEN. I offer the documents, Your Honor.

Mr. MELLOTT. May I have some voir dire, Your Honor?

The COURT. Yes.

VOIR DIRE EXAMINATION

[7592] By Mr. MELLOTT:

Q. Would you first look at Government Exhibit 3679, please.

A. 3679? It is not in this file.

Q. Well, I realize it is not in that group, but it has been offered by the Government and it relates to the voir dire that I am going to ask you.

Mr. ROSEN. Your Honor, I understand that document has been admitted.

Mr. MELLOTT. Yes, it has. I am not questioning that.

The COURT. He is just asking him to look at it.

[7593] The WITNESS. 3679?

Mr. MELLOTT. 3679, please.

The WITNESS. 3678, 3679—found it. This—I don't believe we have gone into this pile.

By Mr. MELLOTT:

Q. Well, this one was offered without any objection by defense counsel, I believe.

Do you see that document?

A. This was one of Mr. Walters' documents.

Q. Let me ask you whether you know whether that is the standard method used by Johns-Manville when it published a price to its customer.

A. Sir, this carries the title of the Western Gypsum Department, and you are asking a man that was in the Eastern Gypsum Department.

Q. I understand. I am simply asking you whether this is the usual form.

The COURT. Are you saying that you can't answer the question?

The WITNESS. I cannot positively answer the question; no.

The COURT. All right.

By Mr. MELLOTT:

Q. Well, did you, in the eastern part of the country, use a similar form in announcing price increases to the [7594] customers of Johns-Manville?

A. No, sir. In most cases, no. I can't think of any.

Q. All right, sir. Now, looking at 2740, Government Exhibits 2740 through 2749——

A. 40 through 49?

Q. Yes.

A. All right.

Q. Do you know whether each of those exhibits was published by Johns-Manville to the trade, and by the trade, I mean its customers?

A. I noticed a definition of the word, "published."

Q. I mean mailed to your customers.

A. No, I do not, sir.

Q. Do you know whose handwriting appears on Government Exhibit 2740?

A. No, sir.

Q. Do you know whether that handwriting was on there when the document was produced to the Government?

A. Not without looking at the copy that we kept.

Q. And you don't have that with you?

A. No, sir.

The COURT. Well, you have it, haven't you, Mr. Mellott?

Mr. MELLOTT. No, Your Honor. I only [7595] have a copy of what he has there. I guess he means a copy that he has kept at his home office, I gather.

The COURT. Well, are there copies available, if that's relevant?

Mr. ROSEN. Your Honor, what we have up there on the stand is the original, what we consider our original. In other words, it is the original document that was submitted to us by Johns-Manville, and I represent any handwriting on there was on there when it was produced to us.

Mr. MELLOTT. I accept that, Your Honor.

I will not ask any more questions in that vein, except maybe to see if he knows whose handwriting it is.

The COURT. All right.

In other words, what we are saying here is, if you get a photostat with a photostatic copy of handwriting on it, then the handwriting was on it when you took the photostat, you see.

By Mr. MELLOTT:

Q. Would you look at 2750, Government Exhibits 2750 through 2756, please?

A. All right. I have 50 here.

Q. I notice that's a different form than the documents—Government Exhibits 2740 through 2749; is that correct?

A. That is correct, sir.

[7596] Q. Do you know the reason for that?

A. Yes, sir.

Q. Would you tell me what that is, please?

A. That prior to this time it occurred to me that the word, "Johns-Manville," was not on any of our price lists.

Q. So this form that's reflected here on Government Exhibit 2750 is a newer form that you started to use——

A. Correct, sir.

Q. —I take it, than the ones indicated in 2740 through 2749; is that correct?

A. That is correct.

Q. Do you know whether each of these documents, Government Exhibits 2750 through 2756, were published to the trade, and by that I mean to your customers?

A. No, sir. I could not tell you which, if any, were.

The COURT. What was the purpose of making up these price lists? What did you do with them? What purpose did they serve?

Mr. MELLOTT. I am sorry. I must have missed that.

The WITNESS. Some of them may have been sent to the customers. I don't know, but, at the time I was in the department, this was not the normal procedure.

Mr. MELLOTT. That's all I have, Your Honor.

The COURT. Any further questions?

Mr. ROSEN. Yes, Your Honor, just a couple, please.

[7599] The COURT. Wait. Is there any objection to the exhibits?

Mr. MELLOTT. I do have an objection, Your Honor.

I was waiting to see if there was any other voir dire.

I object on the ground that no proper foundation has been laid.

The COURT. Do you have further questions?

Mr. ROSEN. I have further questions on a couple of related documents to those, Your Honor, but not on these specific documents.

The COURT. Not on those. All right.

Now, I am going to admit these documents.

You remember what I said, when I admitted other similar documents. The question is, did it affect the competition in the market? And you have heard the explanation as to what these documents were, how they were used. At an appropriate time, counsel will argue to you, one side, both sides, everybody can argue to you, what they think you should infer from the documents. They will tell you, but it will be for you to determine what inferences you wish to draw from them. Each side will argue what they [7600] feel you should or should not infer, and then you will draw those inferences, if any, as a result of the entire circumstances surrounding the case.

[Government Exhibits Nos. 2740 through 2799; 2818 through 2849; 3506, 3556, and 3557 for identification were received in evidence.]

The COURT. All right. Go ahead.

[7601] Mr. ROSEN. Thank you, Your Honor.

DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. Mr. Otterson, in front of you, you will see what has been marked for identification Government Exhibit 5030. I will direct your attention to the 4th and 6th pages of that exhibit.

A. All right.

The WITNESS. Your Honor, so our salesmen would know what price to quote the customer and our office would know what price to bill the customer.

The COURT. In other words, they weren't supposed to be circulated to the trade, then; is that what you are saying? [7597] The WITNESS. We took the cheap way out, sir, and, if the district office made Xerox copies and passed them to the salesmen and the salesman had a customer that wanted one, he handed him one.

The COURT. All right; but the presence in your file, then, would indicate that they were sent to your people so they would know what prices to charge; is that what you are telling me?

The WITNESS. I did note, on one or two of these, in my own writing, "never issued."

The COURT. There are some that say "never issued"?

The WITNESS. There are some that have, in my handwriting, on them, "never issued."

The COURT. All right.

Q. So that in some cases they were prepared in draft form and not published; isn't that correct?

A. That is correct.

Q. And I assume the two that you have just referred to in your response to His Honor were Government Exhibits 2768 and 2787; is that correct?

A. 68 is in my handwriting, "Cancelled, this list never used."

Q. All right.

A. And the other number, sir?

Q. 2787. [7598]

A. "Cancelled, never in effect." That is in my handwriting.

Q. So those are the two you were referring to when you were responding to His Honor; is that correct?

A. That is correct.

Q. Well, now, would you look at the balance of those documents, from 2757 through 2779; 2818 through 2849; 3506, 3556 and 3557, and excluding the two I have just identified with you, 2768 and 2787, and tell me whether you can testify that each of those documents were published to the customers of Johns-Manville?

A. I believe I have already.

The COURT. I thought he explained that that isn't what happened to them, that they were sent to their own people so they would know what the prices were.

Q. Can you identify those two pieces of paper?
A. Yes, I can.
Q. What is it?
A. Sheet number four carries the title, "Gypsum Products Terms and Conditions of Sale."
Q. And do you recognize the number down in the lower right-hand corner?
A. That is my handwriting.
Q. Did you put that number on that document?
A. I did.
Q. And can you identify page number six?
A. "Gypsum Products Terms and Conditions of Sale."
Q. And do you recognize the number in the left-hand margin?
A. That is in my writing.
Q. Did you take both these documents from the files [7602] of Johns-Manville Corporation?
A. I did.
Q. That was in accordance with your submission in answer to a Grand Jury subpoena?
A. It was.
Mr. ROSEN. I offer those two documents, Your Honor, in that exhibit.
The COURT. Any objections?
Mr. MCSWEENEY. I don't have it.
Mr. MELLOTT. Am I correct that just two pages were offered?
Mr. ROSEN. That is correct, Your Honor.
Mr. MELLOTT. I don't have any objection, Your Honor.
The COURT. All right.
What are we going to do, take pages four and six out of it and make them the exhibit?
Mr. MELLOTT. I assume they have to be taken apart, Your Honor.
The COURT. Would you——
Mr. ROSEN. We will separate them.
The COURT.—separate them or take pictures of them and only have the two pages we have admitted in that folder?
[7603] Mr. ROSEN. We will, Your Honor.
[Pages 4 and 6 of Government Exhibit No. 5030 were received in evidence.]

The COURT. Ladies and gentlemen of the jury, when we talk about these exhibits and how you are to treat them, and so forth, if you want to see them, you can see them. We will show you anything you want to see, so bear that in mind. Anything you want to see, that we think you should see. Let me put it that way.

By Mr. ROSEN:

Q. Mr. Otterson, would you look at Government Exhibit 3686?
It should be in the folder in front of you, please.
Can you identify the type of document that is?
A. That is internal teletype.
Q. Is that the form that J–M used at that time?
A. It is.
Q. And do you recognize the name at the bottom of the teletype?
A. E. C. Smith.
Q. Did he work for Johns-Manville at that time?
A. Yes.
Mr. ROSEN. I offer the document.

[7604] VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Do you recognize the name of the person to whom the document is addressed?
A. I do.
Q. Is this a he or a she?
A. Three he's.
Q. Three he's? All right.
Were they all employees of Johns-Manville at the time?
A. They were.
Mr. MELLOTT. No objection, Your Honor.
The COURT. All right. It is admitted.
[Government Exhibit No. 3686 was received in evidence.]

DIRECT EXAMINATION (CONTINUED)

By Mr. ROSEN:

Q. 3678, please, Mr. Otterson.
Do you recognize the form of that document, sir?
A. I do.

Q. What is it, sir?

[7605] A. It is a trade—or a bulletin mailed to the trade.

Q. Do you recognize the letterhead across the top?

A. I do.

Q. Is that the letterhead of the Johns-Manville Corporation?

A. At that time, it was.

Mr. ROSEN. I offer the document, Your Honor.

VOIR DIRE EXAMINATION

By Mr. MELLOTT:

Q. Is this a document mailed out in the western region?

A. I would say definitely this was mailed. Important, please note, this was our designation to get somebody to read it.

Q. This was the western region, not the eastern region where you have your familiarity; is that correct?

A. '68—the western region came into being at the time we purchased Fibreboard, so I don't know the chronological period of time that would answer that question.

Q. I asked you a while ago about Government Exhibit 3679, which you said related to the western region. Do you remember that?

[7606] A. Because it is dated October, 1970.

Q. Yes.

This also relates to the same region, does it not?

A. It would appear to. It mentions two states in it.

Q. All right, sir.

Whose handwriting appears in the lower left-hand corner?

A. I have no knowledge.

Q. Do you know if this document was actually published to the customers?

A. No, I do not.

Mr. MELLOTT. I object, Your Honor, on the grounds there is no proper foundation.

The COURT. Overruled.

[Government Exhibit No. 3678 for identification was received in evidence.]

Mr. ROSEN. Well, Your Honor, I would like to simply introduce three documents, and I understand there is no objection to their introduction. They are Government Exhibits 3618, 3631, and 3656. I offer those three documents.

The COURT. They are admitted without [7607] objection.

[Government Exhibits 3618, 3631, and 3656 were received in evidence.]

The COURT. You may hear those referred to during the closing arguments of counsel, and, of course, then you can see them if you want them. They will be available.

Mr. ROSEN. We have nothing further, Your Honor.

The COURT. Is there any cross examination?

Mr. MELLOTT. No, Your Honor, but I would like to make one comment.

The COURT. Comment?

Mr. MELLOTT. Well, at this point, just to be sure that my understanding with counsel for the Government is correct, while I realize that this is in the Government's case, I do not want to have to call Mr. Otterson or someone back from Johns-Manville for the purpose of authenticating documents for Georgia-Pacific.

I have marked and furnished to the Government the following documents from the files of Johns-Manville:

Georgia-Pacific 1110 through 1147.

[7608] 1149 and 1154 through 1158.

It is my understanding the Government will stipulate as to authenticity on those documents, so I need not offer it at this time.

The COURT. Is there any objection to their admission?

Mr. FRICANO. On relevancy and materiality.

The COURT. You won't need a witness?

Mr. FRICANO. No, Your Honor.

The COURT. Does any other counsel have any objection?

All right, fine.

Then you may step down, Mr. Otterson.

[Witness excused.]

• • • • •

[7707] The COURT. As I say, I am certain when you transmitted this to the Government you kept the control copy of it, a photostat of it, for control purposes.

Mr. MCSWEENEY. Yes, and it is on there.

The COURT. So it must have been on the original. Who put it on there doesn't seem to me to be pertinent. It is admitted.

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[7747] • • •

Mr. FRICANO. The next series of documents, if Your Honor please, which I intend to read to the jury, deal exclusively with the credit situation.

• • • • • •

[7749] • • •

The next document is 975, which is a U.S.G. company request for specific price adjustment to meet competitive situation, and it consists of four pages, and the third page is dated May 5, 1967 and this is a note, a typed note, with some handwriting on it, and it is from G. R. Evans, otherwise known as Bob Evans, and it is addressed to the defendant, A. J. Watt.

It states:

> Attached green sheet for your information. National recently admitted they had an interest free note with Adobe Brick, Hollywood, Florida (Mak Sik) in 1966. They now have a 6% interest bearing note for $140,000 beginning 4-1-67. The free note has been paid off, they say.
>
> Please note and return.

Under that in Mr. Evans' handwriting, not Mr. [7750] Watt's, but Mr. Evans' handwriting appears this sentence,

> We were led to believe they had no such arrangements.

Under that is Mr. Watt's initials, A. J. W.

• • • • • •

DISCUSSION

[7760] • • •

The COURT. Gentlemen, proceed.

Mr. BARTLIT. I have a preliminary matter.

The COURT. All right.

Mr. BARTLIT. Defendants have a brief to file which requires a little explanation. It was going to be filed last week, and it

relates to price verification. The brief was based on a remark Your Honor made to the jury relating to price verification.

As we thought about it, we determined that it would be appropriate since we have never laid out to the Court what we conceive to be all of the authority on price verification. We decided that this would be an appropriate time to set our views forth.

As Your Honor will see, some of the relief we ask for may not be appropriate unless this jury trial begins again. But even though I think at this point Your Honor can ignore the relief requested, I think it will be helpful because you will see what we say the law is on price verification, and that is the main purpose for filing this in this court at this date so the Court will have it for all of the arguments.

The COURT. All right.

[7761] Let me say this. What I was trying to make clear is that the Robinson-Patman Act does not require verification. I have never made the statement that verification, under certain circumstances, would not be justified. But as I understood that colloquy to contend, there seemed to be an idea that you are required by the Act to verify before you meet a competitive price. There is no such requirement as far as I understand the law.

Mr. BARTLIT. Well, Your Honor, I——

The COURT. In other words, that is putting it the other way around.

Mr. BARTLIT. There are, without arguing the motion now, there are—I am not so sure that I really disagree with the way Your Honor put it. I would say there are some circumstances were some kinds of verification are required. There is a question as to what verification, but I think what our brief will do is to set forth to the Court——

The COURT. Yes.

Mr. BARTLIT.—all the authorities as we know them, and what we perceive the law to be, and so you know then where we stand.

The COURT. It will be helpful. And I will merely state that there are not some circumstances in which verification is justified. I do not take that kind [7762] of a position. I do take the position that under no circumstances is any particular method

of showing good faith a requirement. You can show good faith by various other means as well as by—for example, you could take the people's word for it in the field if you wanted to.

Mr. BARTLIT. Yes, sir. We say that in the brief.

The COURT. That could be good faith, but I don't think it is accurate to say that the Robinson-Patman Act requires any particular form for that good faith.

Mr. BARTLIT. What we say in the brief, Your Honor, is essentially that there are a number of ways you can verify it from the customers, from invoices, from the marketplace. Sometimes when you don't have those, you have no choice but a direct contact. And then we discussed the law on direct contact.

The COURT. Yes. But I feel there to be circumstances where you do nothing but meet an alleged price and still be showing good faith.

Mr. DELONE. A what, sir?

The COURT. And still be showing good faith even though you did nothing to verify it.

Mr. BARTLIT. Depending on your knowledge what was going on in the market?

The COURT. Certainly there could [7763] be such a circumstance, certainly. Whether there was such a circumstance in any particular instance is a matter of fact.

Mr. FRICANO. I have no problem. This Court was clear in what he said at the time, and I have no problem with this.

The COURT. But it will be helpful, and I will keep the brief.

Mr. FRICANO. Of course I might point out, and I am sure that it hardly even needs necessarily be said, but I don't agree with that piece of paper.

The COURT. That doesn't really—I am not surprised. I am sort of always a little fearful of any kind of catch phrase. And I don't mean anybody is trying to catch inappropriately. I don't think there are any passwords in the law. I think we are trying to get at whether or not there was or was not—we are trying to find just what the truth is. Was there a good faith attempt to meet the Robinson-Patman Act, and is that all. And even if there was a good faith attempt to meet the Robinson-Patman Act, did it amount in any way to a violation of the Sherman Act. Those are the kinds of problems we are going to be faced with.

Mr. DELONE. I merely wanted to say, sir, that Mr. Bartlit in his opening remarks commented on [7764] what he thought would be the helpfulness of this document to the Court at this time.

The COURT. I haven't had a chance to read it.

Mr. DELONE. I realize that, sir, and I don't think he ended. But I want to make clear if he was suggesting that should the case go on, we do not request the relief sought in that memorandum. That is not my purpose.

The COURT. What relief do you request?

Mr. DELONE. We are asking for either of further explanations of the verification problem with particular reference to the necessity under some circumstances.

The COURT. There is a request that the jury be instructed that the good faith meeting competition defense imposes a duty to verify customers' reports, and I don't think it does.

Mr. FRICANO. Yes, that is correct, Your Honor.

The COURT. But I will study the brief.

* * * * *

[8053] * * *

The COURT. All right.

Now, let's step forward from what happened prior to the statutory period to what happened within the statutory period.

Mr. FRICANO. All right, Your Honor. Easily done.

I hand to the Court the document which we prepared last night, and we will disseminate this to counsel.

If Your Honor please, you will notice that this is entitled price fixing discussions within the statutory period.

* * * * *

[8085] * * *

Mr. FRICANO. I wanted to point out just the illustration the continuation, notwithstanding the pap on paper of policy, we are abiding by the law at National Gypsum, and all that stuff. You know, they write it and put it in the round file and forget about it and continue on doing it, as this industry has since the turn of the century. And I submit, Your Honor, this has got to stop. This Court is aware, and he has said it time and time

again himself, the importance of the antitrust laws at this time, particularly in this time.

The COURT. Yes. Of course, that has nothing to do with how I pass on a motion.

Mr. FRICANO. That was rhetoric, but I do get a little inflamed inside when I start thinking of what has been going on in this courtroom for the past three months.

* * * * *

[8135] * * *

And in this Government Exhibit 908, dated December 10, 1965, when it states, "It will be necessary that you and other appropriate personnel develop definitive new terms followed by development of a specific procedure for [8136] administering such a new program," the fact that this is totally unrelated to any alleged conspiracy with respect to the credit change that took place on March 1, 1966, is further demonstrated by the fact that a month later on January 10, 1966, there is another document, and I believe that is Government 912, which indicates that at that point the National Gypsum Company was still considering developing a cash discount program based on a per ton or per 100 weight basis. I suggest the fact that December 10, 1965, happened to be a date on which Mr. Fredericks appears to have been in Buffalo, and that December 10, 1965 was the date of an inconclusive, continuing, prodding memorandum from Mr. Brown again does not meet the description of evidence of conspiracy. There is in fact no evidence of any action of any kind taken by Jay Nicely or Colon Brown within the statutory period that is remotely related to the charges in this case.

There is in fact, nothing prior to December 27, 1968, which could implicate them even if that were now open under the statute of limitations.

* * * * *

[8141] * * *

The COURT. Good morning. The various motions for judgement of acquittal and the renewed motion to dismiss on the basis of prejudicial delay are denied.

* * * * *

[8145] * * *

The COURT. The motion to strike the evidence concerning the alleged meeting at the LaFayette Hotel is granted.

The motion rela ing to evidence related to alleged predatory conduct concerning the Texas Gypsum Company and the testimony of Mr. Claude Huckleberry is denied.

The motion relating to the evidence related to the record retention policies and practices of the Celotex Corporation or Kaiser Gypsum is denied.

The motion relative to the evidence related to packaging, shipping and material handling practices of the corporate defendants is denied.

The motion relative to the evidence relating to applicator discounts in the Northwestern area in the year 1965 is denied.

* * * * * *

[8152] JOSEPH L. BALDWIN, JR. called as a witness and having been first duly sworn to testify to the truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. KECK:

Q. Mr. Baldwin, would you please state your name and residence address.

A. My name is Joseph L. Baldwin, Jr. I live at 1211 Cowper Street in Palo Alto, California.

* * * * * *

Q. Do you appear here pursuant to a subpoena?

A. Yes.

Q. By whom are you employed?

A. Arcata National Corporation.

Q. In what capacity?

A. I am the treasurer of the company.

Q. Does Arcata National have anything to do with the [8153] manufacture or sale of gypsum products?

No.

Q. Does Arcata National have an financial interest in United States Gypsum Company?

A. No, it does not.

Q. Do you have any financial interest in U.S. Gypsum?

A. No.

Q. You have been previously employed by U.S. Gypsum?

A. Yes, I was.

Q. During what period of years?

A. I started with U.S. Gypsum in the fall of 1958 when I got out of the army. And I resigned from that company . . .

* * * * *

[8155] By Mr. KECK:

Q. Mr. Baldwin, can you tell us the positions that you held with United States Gypsum Company from 1966 on until your resignation, giving approximate dates?

A. In January of 1966 I was transferred to New York City and I worked in our Eastern Construction Products Division, which was created at that time. I worked for the general manager of that division.

In September of 1967 I was transferred back to Chicago as Director of Marketing Policy.

At the end of October, the beginning of November, 1968, I went to work in something called U.S. Gypsum Urban Development Corporation, which was a slum rehabilitation activity.

And, about a year later I went to work as Assistant to the Vice President of Finance, Mr. Dykes, and was in that job until I resigned at the end of May of 1971.

* * * * *

[8156] Q. Now, for purposes of your testimony today, Mr. Baldwin, I would like to focus my questions on the time period from September 1, 1967 into November, 1968, during which period you have testified you held the position of Director of Marketing Policy located in Chicago.

So, unless I indicate otherwise, my questions will be with principal reference to that period of approximately 15 months between September 1, 1967, and November, 1968. Is that clear?

A. I understand.

Q. What were your duties as Director of Marketing Policy for United States Gypsum Company?

A. My primary responsibility was to gather information as to price trends and competitive marketing practices and pass

that information on to the senior management of the company and, as well, to recommend within U. S. Gypsum marketing policies for the company.

Q. Were those activities limited just to gypsum board, or did it include that product and others?

A. It included others.

[8157] Q. Did your duties in that capacity involve analyzing U.S. Gypsum's marketing policy in the light of trends in the marketplace?

A. Yes, it did. Exactly that.

Q. Did your duties include recommending new policies regarding U.S. Gypsum construction products?

A. Yes, sir.

Q. Who was your immediate superior as Director of Marketing Policy between September 1967 and November 1968?

A. My immediate superior was a man by the name of David Wright, who went into a position called Director of Policy and Planning. That was a position that was created at the same time that I became the Director of Marketing Policy.

Q. You both assumed new duties in September 1967?

A. That's right.

Q. Were you and Mr. Wright told by any of your superiors what was expected of you in your new jobs?

A. Yes, we were.

Q. Can you tell us when that would have occurred?

A. I can't recall a specific date, but certainly within the first week or two that I was in Chicago. You know, in the process of moving there from New York to start this new job.

Q. And where did this occur?

[8158] A. One particular meeting I recall occurred in the office of the president of the company, Mr. Morgan.

Q. And that was in this period of early September, 1967?

A. That's right.

Q. Can you tell us who else was present besides yourself and Mr. Morgan?

A. To the best of my recollection, Mr. Watt and Mr. Duffy were there at that time.

Q. Was Mr. Wright there?

A. Yes.

Q. Would you tell the Court and jury what was said at that time?

A. Well, the thing I particularly remember was, since Mr. Wright and I were both new to these positions, and in fact new to this aspect of the company's business, was a discussion of some of the past history of our marketing policies, and some of the events that had occurred in the earlier years. And really an explanation to us, if not an invitation, to bring our talents or authorities or imagination—or whatever—to helping to develop and devise new marketing policies or strategies that would improve the company's results.

[8159] By Mr. KECK:

Q. Do you recall whether anything was said about their satisfaction or dissatisfaction with the trends that they then observed?

A. Well, I think in general there was dissatisfaction probably throughout the company and certainly on their part and ours, in that the—some of the history that I referred to that we described had involved, among other things, a—what, I suppose you call it price war in the business, that had occurred in the—I think in the early 1960s, in which, I think, prices and profits had suffered for U.S. Gypsum.

There had been a subsequent period where our policy or marketing strategy had been to adhere pretty rigidly to our published bulletin prices.

My recollection is that while that had tended to keep the prices that we were getting for our material up, we lost a lot of business. Our share of the business that was being done in the country went down during, oh, sometime in the mid-60's, and had been been going down, and it was about—at the time I came into the job, I recall hearing about it was at a lower level than it had been at, say, a couple of years earlier.

Q. What did Mr. Morgan or Mr. Watt tell you with respect to what they expected of you and Mr. Wright in your [8160] new jobs?

A. Well, as I indicated, we were simply expected to, as I understood it at the time, I guess, and as best I recall it now, to try to bring some fresh—some fresh thinking into this area, into this aspect of the company's business.

• • • • •

[8161] Q. * * * In September, 1967, Mr. Baldwin, were U.S. Gypsum personnel still engaged in the occasional practice of verifying reports of lower prices reported to customers by your competitors on gypsum wallboard?

Mr. FRICANO. Object to the form of the [8162] question.

The COURT. Overruled.

The WITNESS. Yes.

• • • • •

Q. Between September, 1967 and November, 1968, was there any change with respect to verification on gypsum products?

A. Yes, there was.

Q. And what was that change?

A. We—I—and I made some verification calls myself—stopped making those calls sometime during 1968. I can't recall specifically when, but I think sometime during the first half of that year, perhaps in the late spring.

Q. As best you can recall, it would have been in the first half of 1968 and sometime in the late spring?

[8163] A. That would be my best recollection, yes.

Q. In September, 1967, who, within U.S. Gypsum, was authorized to determine U.S. Gypsum's prices and deviations from its published prices on gypsum products?

A. That authority was centralized in the corporate office in Chicago. It rested, really, as best I understood it, at the time I went into that job, it rested with the president of the company.

Q. Was there a change in the policy at U.S. Gypsum between September, 1967 and November, 1968?

A. Yes, there definitely was.

Q. What change was made?

A. We—when another price war started, which is what happened while I was in that job, we delegated—the senior management of the company delegated some authority out to the general managers in its construction products divisions, some authority to cut prices and meet lower competitive prices in the marketplace.

• • • • •

[8165] Q. What was the significance of this divisionalization of company at the beginning of 1966?

• • • • •

[8166] The WITNESS. It is a kind of hard question. The significance, as best I recall the significance, to me, as a young manager in the company, was that it represented a decentralization of management or of control, if you will, in the company. It had always—United States Gypsum had always, to me at least, been a highly centralized company. It was a big company and operated nationwide, but it was run from the top of the corporate headquarters.

The creation of these divisions, really, the key feature that happened at that time was that the company created for the first time in its history a job with the title of general manager. The man—there were four of [8167] them—that headed each of these four divisions was called the general manager of that division and he had responsibility for, as far as construction products were concerned, responsibility for the company's total operation in that part of the country for the manufacture and sale of products and the profitability of those operations.

• • • • •

Q. Now, you have said that each of the four divisions had a general manager. Did he have responsibility for all aspects of his business?

A. He—it struck me somewhat odd at the time. As I said before, he was responsible for the manufacture and sale of products, and at least theoretically was responsible for the profits of that operation. At the time that the divisions were first created in January, 1966, one thing that he didn't have authority over was prices.

Q. And price deviations?

A. At that time that was still—the control and authority on pricing was still in the corporate office in [8168] Chicago.

Q. When you refer to prices and pricing, does that include also deviations from published prices?

A. Yes.

Q. And terms? You are not using it in a narrow sense, but a broad sense?

A. That is right. Both the bulletin prices and changes in them, as well as deviations from those prices or discounts from them, or cuts from those prices.

Q. During your tenure as Director of Marketing Policy, did you observe a change in what you have just referred to as not having—that is the general managers not having any control over or authority with respect to pricing?

A. Yes, I did.

I think I indicated earlier, during the time starting in the fall of 1967, when I was on this job in Chicago, there was authority with respect to the pricing of gypsum wallboard delegated from the management in Chicago to the general manager.

Q. When——

A. It became a practical necessity.

Q. When, if you recall, did that delegation process begin?

A. My best recollection is that it began almost [8169] immediately after I went into that job. The—in the fall of 1967, the most confused and chaotic conditions in the marketplace, as they were being reported in to me, were in the—were on the West Coast. And my earliest recollection of there being authority to cut prices being delegated out to these general managers was to the then manager of our Western Division in California and I think that occurred as early as late September or sometime in October, 1967, probably.

Q. Were similar delegations made to the other general managers of the other divisions thereafter?

A. Yes, they were.

Q. In September, 1967, what policy did United States Gypsum have with respect to meeting the lower prices reported to be offered by single plant producers?

A. My understanding, of what I recall being told at the time I assumed this position, was that for the prior couple of years—as I recall a year and a half or two years—it had been the company's practice—it had been the company's general practice not to meet the lower prices of competitors, and particularly—and there may have been some exceptions—but particularly not to meet the competitive prices of the smaller so-called one plant producers.

Q. Between September, 1967 and November, 1968, was [8170] there a change in that policy?

A. Oh, there certainly was.

Q. What was that change?

A. We started to meet all that competition, all the competition, including the one plant producers.

Q. To your knowledge, in September, 1967, was there a job protection commitment register still being maintained on behalf of United States Gypsum by the Arthur Anderson accounting firm?

A. No, there was not.

Q. You have mentioned changes in three policies which occurred between September, 1967 and November 1968 relating to the stopping of verification on gypsum products, the delegation of pricing authority to the field general managers of divisions and meeting lower prices of single plant producers. Did these changes have the approval of Mr. Watt?

A. Yes, they did.

Q. And of other top management of your company?

A. Oh, I think everyone in top management was aware of and, in fact, had to okay those changes.

• • • • • •

[8171] Q. Can you tell us how or why these came about, to your knowledge?

A. I think the principal reason was we were getting killed in the marketplace. We had been losing industry position, as it is called, as you indicated with that earlier chart.

Q. Government Exhibit 3800, the colored chart?

A. Yes.

[8172] We sustained even sharper losses of industry position during the—my early period as Director of Marketing Policy.

Q. Can you describe the sharper drop a little more fully?

A. I particularly recall—and this was information that, of course, you never knew as it was happening—but I guess information gathering—some of it you knew a little after the fact—the—I don't know what has happened since, but I well remember October, 1967, because when the information was put together, which would have been some time in December of 1967, our industry position had dropped on gypsum wallboard, had dropped below 25 per cent. It was 24 and a fraction per cent, as I recall.

Q. Well, was that the low point or did it keep on going?

A. As I say, I think maybe for a single month that is the way that—that is the one that sticks in my mind. In the subsequent months I was in the job, although I have no idea what has happened in recent years——

Q. You said your company——

A. —that was so low, compared to what the company's share of business nationwide had been historically, and even as that chart that we talked about a minute ago had indicated, it had dropped over the years from 1963 to 1967. [8173] it was really quite a bombshell.

Q. You mentioned a figure of something like 24 per cent. From what was the fall? From what range to 24 per cent?

A. From in the low 30's somewhere. I think it was 30—in the month of September, it was 33 and a fraction.

Q. And in October?

A. In October it was 24 point something.

Q. A drop of over 6 percentage points in one month?

A. Well, it was—maybe 9 percentage points, depending on, I think, depending on the fraction. I don't recall the fractions.

Mr. KECK. May we have Government Exhibit 3800?

[8174] By Mr. KECK:

Q. I am putting it right-side up so that you can look with me at the bottom of Government Exhibit 3800.

You say that you recall your company losing 9 percentage points of marketing position in one month?

A. That's my recollection. That the September figure was 33 and a fraction, and the October figure was 24 and a fraction.

Q. Well, now let's look at Government Exhibit 3800, and let's look, for example, at Celotex.

Between these two lines is 10 percentage points. That's a volume of business larger than the sales of Celotex during that period?

A. Yes, it would be, if I understand this chart.

Q. And that's greater than the number of single plant producers by color, Republic, Texas, GAF, Grand Rapids, shown at the bottom of the chart—1, 2, 3, 4, 5, 6, 7 of them in 10 percentage points?

A. Uh huh.

Q. It was equal to the volume of six of them at that time?

A. Approximately so.

became apparent that our failure or refusal to meet their competitive prices encouraged them to grow and expand. And, as best I recall, some of them had, had increased their capacity.

Q. Were there any others besides single-plant producers who had grown during this period of U.S. G's policy of attempting to get the list price?

[8177] A. Competitors whose market shares had grown?

Q. Yes.

A. I don't have any specific recollection of that. I know we had lost market industry position over those couple of years.

Q. Do you recall . . .

A. I suspect that Georgia-Pacific may have increased its market share, although I don't recall specific date on that.

Q. Do you recall at that time whether or not it was distributing gypsum board through distribution centers?

A. Georgia-Pacific and Bestwall?

Q. Yes.

A. Yes, it was. Yes, it was.

Q. As Director of Marketing Policy, did you form any conclusion yourself as to whether or not U. S. G. should continue its policy of not meeting reported lower prices of single plant producers?

A. Yes, I did.

Q. What was your conclusion?

A. Well, it seemed clear that we wouldn't continue that policy because of the damage that it was doing and had done to our industry position or our share of the market.

• • • • •

[8178] Q. Did you discuss it with any of top management of U. S. Gypsum Company?

A. Oh, Yes. Mr. Wright, Mr. Watt, and Mr. Duffy. And Mr. Morgan on some occasions.

[8192] Q. You mentioned there were two types of PA'S. What does job protection mean?

A. That is a different situation and as best I recall, it was a situation where the—it covered material sufficient to accomplish a particular construction, piece of construction or construction project. And I think the protection refers to protec-

Q. And that was within a month or two of when you took responsibility for the job?

A. Yes. As I say, the best recollection is that that [8175] information or statistic was known probably in December.

Q. I believe you said earlier that in September, 1967, U.S. Gypsum's policy still was not to meet lower prices offered by single-plant producers.

Now, when you came into the job in September, 1967, did you learn why U.S. Gypsum was not dropping its prices to meet the single plant competition?

A. Well, my . . .

Q. I'd like yes or no, if you could answer that question.

A. Yes.

Q. Well, can you tell us why?

A. My understanding was that—as I said before—part of the background was that in the early 1960's there had been a price war in the business, lots of price cutting and low, low prices Bad overall results U.S. Gypsum had abandoned that strategy, so to speak.

Q. Approximately when?

A. Oh, a couple of years. A year and a half to two years before I went into this position is my best recollection. And had adopted a marketing policy or strategy of adhering to their published bulletin prices as a general rule.

And as I think I indicated earlier, my recollection—although I certainly don't remember all the statistics [8176] right here and now—was that while that product had a favorable result as far as the level of prices that U.S. Gypsum was getting for what it was selling, they were selling a lot less material and lost industry position in this period '65 to '67, again as was indicated on that colored bar chart. But . . .

• • • • •

But, during that period of '65 to '67, and when I came into this job, as I say, I recall being told that our policy was to sell only at bulletin prices and not to meet the price competition of small so-called one-plant producers.

Q. What had happened to the one-plant producers while U.S. Gypsum was following that policy?

A. Well, as I got into my job, or began to learn something about this aspect of our business—which was new to me—it

tion against a price increase. And normally you would only have job protection, so-called, [8193] when there had been a price increase. And I think it was designed to cover the situation where some user of the product had committed himself to a construction contract of some kind assuming that the price was going to be a given level.

Q. And in your experience——

A. And having committed himself, a price increase, you would protect him for that amount of material, so that he could honor——

Q. A specific amount of material?

A. Yes.

• • • • •

[8200] The COURT. • • • Now, also you remember there was a motion filed asking that I explain my statement that the Robinson-Patman Act does not call or doesn't refer specifically to telephone calls. Does counsel desire that I do that when the [8201] jury is bought back?

Mr. BARTLIT. Yes, sir. Unless anyone disagrees, on the last page of our motion we stated what we——

Your Honor, I suggest that we talk about this at lunch. It won't make any difference if it is in an hour or two or this morning.

The COURT. Here is what I intend to tell the jury, so you will hear it and decide whether you want me to do this or not.

I intend to say that: As you recall, a few days ago I stated to you that the Robinson-Patman Act does not say anything about telephone calls. I wish to clarify that statement at this time.

As you will recall, I read relevant portions of the Robinson-Patman Act to you at the beginning of this trial. The Act provides that the good faith meeting of competition can constitute a defense to a charge or price discrimination under the Act. However, the Robinson-Patman Act itself does not indicate the manner in which good faith may be determined. My comment was merely intended to indicate that no particular form is required to comply with the Act.

Now, that's, as I deem it, an appropriate statement of the law. And, since defense counsel—and I think it was Mr. Bartlit that made the motion—I will read that unless I am requested by defense counsel not to make any comment on [8202] the matter at all.

Mr. BARTLIT. Your Honor, let us caucus on that and come back after lunch.

The COURT. All right.

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[8229] DIRECT EXAMINATION (Continued)

By Mr. KECK:

Q. Mr. Baldwin, I am putting an "A" at the end of U.S.G. 166 on the chart being put on the easel. I ask you if you can identify that as a chart made by you that is reflected in typed numbers in U. S. Gypsum Exhibit 166?

A. That's the very one I used the box of crayons on last night.

• • • • •

[8233] Q. What does this mean when it is over 100 percent of the previous year's volume? As, for example, October 1968, 134 percent. What does that mean?

A. Well, it means that if we had in 1968 sold three billion five hundred and one million feet of wallboard, we would have sold 134 percent of what we had sold the previous year, or we would have had a 34 percent gain in the volume of wallboard that we sold.

Q. But all of it would have been sold at cut price?

A. I doubt very much that we did, because the prices were falling so fast that you would meet one of these prices and maybe get some business. But you wouldn't get what you started out thinking you'd get, because there would be another competitor with a lower price in pretty short order. I don't believe that the company sold over three and a half billion feet of wallboard in 1968.

Q. You previously testified that the basic numbers that went into that were the estimated volume that could be affected by the particular P/A?

A. That's right. Each request to cut a price had as an ingredient the estimated amount of volume that was affected or would be potentially affected by that cut price.

Q. When you came into your position as Director of Marketing Policy—if I understand this chart right—there were 60 P/A's outstanding; is that right?

[8234] A. That's right. In the total United States those were the only cuts below our bulletin or published prices that were in effect at that time.

Q. Now, when you left that position there were then current twenty-one hundred three P/A's affecting gypsum board; is that correct?

A. That's correct. They were alive and in effect.

Q. And that was an increase compared to 1967 volume, an increase from 16 percent to 134 percent?

A. That's right.

Q. Is that what you referred to as a price war?

A. Yes, indeed. This is a reflection of our attempt to wage our part of that price war.

Q. Well, these figures on Defendant U. S. G. Exhibit 166 came from each of the monthly reports that we have heretofore introduced in evidence this morning; did they not?

A. Yes, they did. With the exception that the figures for two of the months shown on this chart came from a single monthly report of mine.

Q. Giving the figures for that month then as the previous month?

A. That's correct.

Q. These then are the numbers that you were reporting monthly to the top management of U.S. Gypsum?

[8235] A. Yes. These are the same numbers that went into the memorandum or monthly report memorandum that went to Mr. Morgan, Mr. Watt, Mr. Duffy, Mr. Dykes and Mr. Wright.

* * * * *

[8244] Q. I believe I had asked you what mill net meant.

A. I think elsewhere we saw that as net sales average, which was the amount of money that we were actually getting after taking out freight for what we were selling.

Q. And before any expenses, costs or——

A. Oh, yes, it wasn't profit. It was our gross receipts.

* * * * *

[8253] * * *

Q. Now your first report, a report made in the first month at least, dated September 25, 1967, says with respect to Georgia-Pacific—and this is one of those that goes at it by way of competitor that you have testified [8254] to?

A. That's right. I was only on the job probably three weeks when I wrote this, and it was my first attempt.

Q. You say regarding Georgia-Pacific-Bestwall:

> Georgia-Pacific-Bestwall continues to be a dominant competitor, apparently gaining volume to the capacity of their plants. Discounts are allowed from U.S.G. price levels to dealers, and in some cases to contractors and builders when they sell directly. Carload and truckload differentials are rarely maintained. By operating their plants at an estimated 110 percent of capacity, we believe that they have averaged an industry position of 15.3 percent for the first seven months of 1967, with only 9.3 percent of industry capacity. Georgia-Pacific is extremely aggressive in the Southern, Central, and Western Divisions, where most of their present capacity is located.

Does this not indicate, Mr. Baldwin, that this aggressive competition from Georgia-Pacific was literally true during the entire 14 months you were Director of Marketing Policy?

A. Yes, it was.

* * * * *

[8256] * * *

Q. So in September, 1967, before the price increase you referred to this morning, it was 33.6, and in the month after the price increase, it was 24.4?

A. That's right.
Q. A drop of over 9 per cent?
A. 9.2.

• • • • •

[8262] [Defendant U.S. Gypsum Exhibit No. 182 was received in evidence.]

By Mr. KECK:

Q. The first sentence of that exhibit says—and I quote:

> In view of the decision to delegate authority to approve price reductions on gypsum wallboard within certain limits to division general managers, we requested legal counsel to provide us with a brief summary of particular points which should be carefully watched in reviewing CPPR's.

That's the green sheet; isn't it?
A. Competitive price and policy report.
Q. "Submitted from the field."
Does this exhibit not confirm the fact that you had previously delegated within limits—or the company had—pricing authority to the general managers of the divisions?
A. Yes, it does.
Q. What led to your distributing, preparing and sending out, this particular memorandum, Mr. Baldwin?
A. Well, it was part of a continuing effort within [8263] U.S. Gypsum to conduct its business affairs in a legal manner. The review of these competitive price and policy reports prior to this time, since all the authority to take any action on them or cut any prices was with the corporate headquarters in Chicago, we were about to change that policy, which was a really historical, a pretty major change to delegate some authority to cut prices to the general managers of the various divisions. And this was a current, up-to-date of really advice, and make sure that they understood how they should proceed in making these decisions now themselves up there, and to be sure that they were proceeding in a legal manner.
I say it was part of an ongoing company sort of a program in that we attempted to be cautious about these kind of things.
One of the things I was given when I went into this job was a memorandum of several pages on legal aspects of selling and

pricing. And when we had meetings from time to time of these marketing policy managers I referred to, every time I can recall, as a part of the agenda we would have one of our attorneys come and talk on the subject of the legal aspects of selling.

• • • • •

[8268] Q. Did the company permit divisional managers to verify prices?
A. To my knowledge there was never any verification of gypsum prices by anyone other than myself and my predecessors.
Q. Do you know why not?
A. In my job in corporate headquarters . . .
Q. Do you know why the division managers were not permitted to verify?
A. Well, the verification that I did was very—was infrequent. And, in fact, we abandoned doing it. It became impractical in the course of my time in this job, and so we simply stopped doing it.
Q. Well, do you know why division managers, after this delegated authority was given them, were not permitted to verify?
[8269] A. Well, verification was—as I say—it was something that I seldom did, and it was one aspect of making a decision about meeting a competitive price. I think at this point in time, and in fact the reason for delegating this authority to our general managers, was that there were so many competitive prices, and changing so rapidly, that we, as I say, I stopped the practice of verification.
Q. Did lawyers . . .
A. It started out in the field.
Q. Did lawyers play any role at the time in reviewing requests for price reductions?
A. Yes. There was a period in those early months in the fall of '67 when I remember having exchange of correspondence with our outside counsel where I would send them a file of these green sheets. We would request a legal opinion as to at least their assessment of the situation, because we were looking at a price we were about to cut, we were cutting it on the ground of meeting our competition. And we sent those over to

the lawfirm and would get—I would get back a written letter or memorandum of opinion from the lawyers as to whether in their opinion the evidence that we had was good sound evidence of meeting competition.

Q. What kinds of price reduction forms would you send to the lawyers; all of them or every one, or were there a particular kind?

[8270] A. No. I think we sent any ones that did in our reasonable best judgment were close cases, so to speak. If there were a competitive price somewhere that we had, you know, many, many reports from various sources that existed, that would generally be pretty convincing evidence of the existence of the price. But if there were some reason why we weren't completely certain, we sent those files over for an opinion.

* * * * *

[8281] Q. Mr. Baldwin, apart from the decision of U. S. Gypsum to start meeting single-plant competition and your decision, that of the company, to delegate pricing authority to division managers, were there any other significant activities at U. S. Gypsum which you were aware of relating to changes in marketing approach or strategy for the future?

A. There was a committee created that was called the Distribution Committee that I met with that attempted to address iself to the same, really, the same pair of problems that I described this morning, that were mentioned to me when I came into this job.

As a company, we have been an industry where—[8282] we have been through some price wars in the early '60's, and that didn't work so well.

We have been through a year and a half or so where we chose not to—where we chose to sell primarily and predominantly at our published bulletin prices, and that hasn't worked too well, because we have lost a lot of share in the marketplace.

You know, there must be a better way. That's what Mr. Wright and I were, I guess, challenged to try to find when we came into this work in September of '67.

That sudden, further loss of our industry share that we were first aware of in December, where we had dropped down to 20 some per cent that we talked about in the month of October,

caused us to change our tactics in that we became much more aggressive in meeting price competition, and that's why there were so many more, we met so many more prices and wound up with this large number of price cuts, but we had done that once before as a company several years earlier, and saw that that hadn't worked over the long run, so this Distribution Committee was created, composed of six or seven men, to spend time trying to think out other longer range strategies to really—to optimize our business results for the long pull.

How should we be best distributing our wallboard, relating to the years ahead.

[8283] Q. Did you meet with the Distribution Committee?

A. Yes, I did.

Q. And when was it formed?

A. I think right at the turn of the year, right soon after we saw how far we had fallen in industry share.

Q. Early 1968?

A. How far that October fall had been which is something we learned and were aware of in December, so my best recollection is that that committee was formed and started its activities about the first of the year, 1968, probably in January of 1968.

Q. Did that committee make any recommendations or suggest any solutions?

A. Yes, it did. We didn't find a pat solution, but the two things I recall we did during the remaining months that I was associated with it, and was in this work, were that we would—we would—by the time it made its recommendations, which was several months later, on into the spring sometime, I know one was that we would have to continue in the short run to compete aggressively on price, and keep cutting prices to meet cut prices, and meet the competition, but that a second continuing objective would be to continue to try to work on this problem of long, long-range, how to distribute our wallboard.

I think we mentioned this morning traditionally [8284] we had sold our wallboard to lumberyards and to building material dealers.

One of the things we found happening with competitive practices, other than that, people that were selling wallboard not to a leader but directly to a drywall contractor or that were delivering it from their plants to a construction job site, which were

things that were not part of our normal marketing policy, but examples of the kinds of the things that we thought we had better begin to think hard about for the long run.

Q. Had U.S. Gypsum had any prior experience with being in the distribution business of gypsum wallboard anyplace?

A. Prior to my time in this position?

Q. Or during your time?

A. weil, we started into it, as I recall, in a limited way.

The California—the San Francisco Bay area, where I now live, was a market where, as I remember,—I don't remember the number, but I know our market share was even lower than it was nationally. It was a very tiny percentage. We were out of that market, so to speak, and a proposal was made by the people in our Western Division to create something that was referred to as the Bay Area Supply Division, which really had the effect of putting us [8285] in a sense in the retail wallboard business.

Q. Were any steps taken to begin to implement the recommendation of this first Distribution Committee?

A. Well, yes. The Distribution Committee's recommendation, you are speaking of, now?

Q. Yes, in the long run.

A. The Bay Area Supply Division, as best I recall, started its roots in the recommendations and that situation on the West Coast sometime in late, 1967, and got started at least by early '68.

• • • • •

Q. Well, now, the committee did make recommendations, you said, a little later in 1968, and it had to do with long-range strategies.

A. That's right.

Q. And——

A. I think one of the things they recommended, that they continue to study any and every, you know, method of distribution to improve or increase U.S. Gypsum's brand [8286] selection versus its competitors.

Q. Did you have anything to do with any efforts to implement the recommendations of that committee?

A. Only insofar as the short-term aspect of aggressively—competing aggressively with our competitors on price in the short run.

Q. And what did you mean by "competing aggressively"? Were there different ways in which the company was going to do this?

A. We, for example, there were a number of things that we—that the policy—that the Distribution Committee, I think, listed as possible short-term pricing tactics that we migh—we—or by this time, the divisions themselves, the general managers, might consider using.

Q. Can you name a few?

A. They could have a, oh, a fire sale, if you will, make an announcement in a given market, you know, that they're just going to sell any and all comers at a lower price for the next 2 weeks or for the next month or whatever.

I recall that type of a pricing tactic bei· g used by Georgia-Pacific.

I remember having mailed in to me some postcard—and they were postcard announcements from a Georgia-Pacific warehouse somewhere that did the very thing, they would say, [8287] you know, a consumer sale, you know, between Friday, after noon until sundown on Sunday, you can come in and pick up wallboard for such and such at a bargain price.

• • • • •

[8288] Q. Who made actually the decision in the company to stop verifying on Gypsum products?

A. Well, I think it was a joint decision. As I recall, it was my own recommendation.

Q. Made to whom?

A. To Mr. Watt.

Q. Can you date that approximately?

A. I can't give an exact date, but the best I can recall is it was in the first half of 1968.

Q. Can you tell us why you made this recommendation, [8289] how you came to make this recommendation?

A. Well, as I think I said earlier, this verification was simply one of the ingredients in arriving at a decision of whether to

meet a competitive price or not, and it was a means that I used very seldom. And, in fact, as this price war got going and the reports of competitive prices were coming in in such greater numbers, it got to the point where it was easy to—and reasonable, in fact—to believe almost anything that was being reported in from the field.

People were cutting prices to all kinds of levels and giving away, you know, free material on top of other material. Everything you could think of.

Q. And did verification, to your knowledge, stop after you made that recommendation and discussed it with Mr. Watt?

A. To my knowledge, it did.

Q. Had you previously engaged in some verification contacts yourself?

A. Yes, I had.

Q. Could you tell us approximately how many?

A. Well, it was very few relative to the number of competitive situations that were reported and that in fact we met.

But I think the total number of contacts that I had with a competitor were perhaps two dozen during the time I was in that job. Or any time, for that matter.

[8299] Q. After you adopted these several policy changes that we have discussed, were you, as Director of Marketing Policy, ever to discern any effects that they had, if any, during this 14-month period?

A. We, in that interval, and overall—I think at least we stopped the decline in our market share, that 24 percent that we looked at, which was the lowest single month ever, to my knowledge. Well, I am quite certain we didn't ever get that low again in the next 12 or 14 months.

And I am not sure, I think we averaged through that period that I was in that job, something close to the 30 percent level overall.

So, at least one result of our being more aggressive and meeting this price competition was to stop that prior two-year trend that we talked about where we had gone from the 37 or 38 percent range to the 31 or 32 percent range—whatever it was.

As I say, in the short run, right earlier in the job we saw ourselves going down under 30 and, in fact, under 25.

Q. After November, 1968, did you continue to have any involvement in the pricing policies of U.S. Gypsum Company as regards Gypsum board?

A. No.

• • • • •

CROSS EXAMINATION

[8303] • • •

QUESTION. Within a marginal for permissible human error, this checking with the competitors was a way of weeding or sifting out the [8304] untrue allegations of untrue lower prices?

ANSWER. Yes. In my own experience those contacts, one of the reasons they were so few in number as they were, they were, to the best of my recollection, limited to a—they were limited to the new price quotations in a given marketing area.

Did you not give that testimony in response to that question, sir?

A. Yes, I did.

Q. Was it true when you gave it?

A. To the best of my recollection, then, as now, that would have been the primary reason for my making the few contacts that I made.

Q. You talk about the few contacts you made, Mr. Baldwin. Where is the record of your contacts, so that we can check them so the jury can see exactly how many you made? Where is your written record?

A. I have no written record, as I testified in this Grand Jury.

Q. You don't have any notes?

A. I think you know that I don't because it is in this record here.

Q. That wasn't brought out on direct examination, was it?

[8305] A. No, I have no written notes.

Q. You didn't volunteer that to Mr. Keck?

A. Volunteer what, the written record?

Q. That you didn't have a written record, on direct examination.

Mr. BARTLIT. Objection. What the witness did or did not volunteer is not an appropriate question.

The COURT. Sustained.

By Mr. FRICANO:

Q. So it is your testimony now that there were approximately two dozen telephone calls in this 13 month time period, yet you can't——

A. I think it was perhaps in a six or seven month time period.

Q. That depends on what testimony you believe, your testimony today or the testimony before the Grand Jury.

Mr. WARNKE. Objection to the question and the agrument.

The COURT. Yes, that is improper and I will ask the jury to ignore it.

• • • • •

[8349] Q. What significance or importance, if any, are list prices?

A. I think their principal significance during the period I was in this job, certainly, as I got into it, and up until the end, they were the reference point from which one made the calculations and subtractions to arrive at what the actual selling price was in those days.

Q. Like on USG's 166-B?

A. Yes.

Q. So as a price increase would occur and the list price went up, even if there were a discount from that list price, you would be discounting from an increased price would you not?

A. If the discounting were from the increased price, [8350] but, as was indicated in some of the texts of some of my monthly reports, that was simply another one of the competitive devices.

Sometimes, even though there had nominally been an increase in the list price, the facts were that that new higher list price was completely ignored, and the discounting was from the previous and lower list price.

Q. Is it your testimony, sir, that in this time period United States Gypsum never sold at list?

A. No, that is not my testimony.

Q. Well, what is your testimony?

A. My testimony, in summary, would be that most of the sales that we were making in the latter part of my tenure in this job were not at list price.

Prior to my coming into that position, I think the vast majority of the sales of wallboard that we were making were at our published prices.

Q. Well, can you explain, Mr. Baldwin,—now, you have used this term, I think, repeatedly, "price war."

How does an industry in the middle of a price war have two price increases?

A. Well, the answer is it doesn't.

Q. Oh, it doesn't. So it just goes out and issues new increased prices with no expectation that it is going to get them, is that right?

[8351] A. You announce an increased price and somebody announces and sells at lower prices, and you withdraw the price increase.

That happened at least once that I can recall during my tenure.

Q. Well, isn't it the fact, sir, that there was a price increase October 1, 1967, that was the effective date?

A. Yes, we raised our published bulletin prices October 1, 1967.

Q. And so did your competition, Georgia-Pacific, Celotex, National Gypsum, Flintkote and Kaiser, did they not?

A. I don't recall that specifically.

Q. And isn't it also a fact that in your reports you also note that whatever discount is occurring from time to time is discounting from the increased price, not the lower pre-1967 price?

A. The answer to that is yes and no. Sometimes it was discounting from the increased price.

Other times, as I indicated, both in those reports and a moment ago, it was even more aggressive price cutting, discounting from the previous lower list price.

But what I referred to in my reports is the pre 10-1-67 price.

• • • • •

[8358] • • •

By Mr. FRICANO:

Q. Well, isn't it a fact, sir, that as you testified and we read your testimony before the Grand Jury, you checked out a price or situation with a competitor when it was the first one reported in the marketplace? Do you recall that?

A. I recall that, to the best of my recollection, as being the most frequent reason why I would have made one of those perhaps ten calls that I made of that sort.

• • • • •

[8364] A. That particular practice—but I didn't follow your other question, because you asked me in a particular situation would it spread nationwide. The answer to that is no, it wouldn't. Most of the competitive prices we met during my tenure, 99 and 9/10ths or more percent of them were met without verifying the competitive prices with the competitors.

Q. As I understand your Grand Jury testimony——

A. That didn't cause that to spread nationwide.

• • • • •

Q. As I understand your testimony, as it was read to you this morning, which you confirmed, your Grand Jury testimony, when you made a check it was when it was a new situation in the marketplace. Is that correct?

A. That, to the best of my recollection, was the primary reason for my making those few calls that I made of that type, yes.

• • • • •

[8436] Q. Now, that was created or concocted—or what have you—by reference to Mr. Baldwin's monthly reports to you;

[8437] is that correct?

A. No, sir. I am Mr. Baldwin.

Q. That's right. I keep forgetting. By Mr.——what the hell was his name? Oh, Mr. O'Brien's monthly reports to you. Is that correct?

A. Yes, sir.

• • • • •

[8452] • • •

Q. Well, isn't it also true, though, sir, at that time, in March, your average selling prices of wallboard were higher than when you took over that job?

A. I think perhaps the difficulty is with the average selling prices of wallboard, some of the various statistics we have looked at.

Q. When you put them all on the board?

A. That mill net sales average, at that point, as I recall, was a higher number than it was in the previous August or September; yes.

Q. So during a price war, the price went up; is that right?

A. It depends on what you mean by the price. The price of half-inch wallboard went down and down.

Q. But the average selling price, for some strange reason, went up and up and up.

A. Not the average selling price.

Q. Or the mill net average price went up and up.

A. There were a number of other factors that could have affected the mill net average, some of which had nothing [8453] to do with average selling price. If the cost of freight would go down, that would have increased the mill net sales average. It would have nothing whatsoever to do with selling prices.

Q. You mean when your mill net average goes up, you are not making more money?

A. Not if your costs go up more than your mill net averages.

Q. You are a statistical expert, Mr. Baldwin.

Mr. Bartlit. Your Honor, I move that remark be stricken.

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[8459] • • •

Q. Now, do you recall now, as you did back in 1972, the trucking situation that you conferred with Mr. Malhiot about in the resort area of Colorado?

A. Yes, I do.

Q. Would you repeat that now, please.

A. As best I recall it, it had to do with reports reaching me from our sales people. I am not sure whether it was our Central or Western Division. I have to look at the map. It was in Colorado in the ski resort areas there, in Aspen, where there was a building boom going on in building condominiums and vacation homes.

And, the reports indicated that there were some direct deliveries being made, since there were no building material dealers, I guess, right there is Aspen. There were deliveries being made from a good long ways away. The manufacturers were trucking material from their manufacturing plants to these jobs in Aspen.

Q. What manufacturers, sir?

A. Well, I think there was a report on Flintkote. And I think that I talked to Mr. Malhiot about—I called [8460] him to ask whether it were a fact that Flintkote was trucking board to—I think it was Aspen.

Q. To the Aspen, Colorado, resort area?

A. Yes.

Q. For the condominiums that were going up?

A. That's my best recollection.

Q. Do you recall at this time, was Flintkote the only one that was reportedly doing it?

A. I don't remember. That's the only one that I do remember.

Q. Did you ever tell Mr. Malhiot that you weren't going to exchange prices anymore?

A. Well, I never exchanged prices with Mr. Malhiot.

Q. Or discuss prices. Excuse me.

A. Not that I recall.

Q. Did you ever tell Mr. Atwell that you weren't going to?

A. Not that I recall.

Q. Did any of your competitors, Mr. Atwell or Mr. Malhiot, ever tell you that he wasn't going to discuss prices with you anymore?

A. Not that I recall. My best recollection is that, as I say, sometime in the first half of 1968 I simply discontinued the practice of calling companies. Each of them I probably called five or six times. And subsequent to that, [8461] at some interval of weeks, I stopped hearing from them.

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[8466] ROGER L. WALLACE, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. KECK:

Q. Please state your name and residence address.

A. Roger L. Wallace, Wilmette, Illinois.

• • • • •

Q. By whom are you employed?

[8467] A. I am employed by the L & W Supply Corporation.

Q. What is the business of L & W Supply Corporation?

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The WITNESS. The business in the L & W Supply Corporation is the wallboard specialty dealership business dealing in the distribution, purchase and resale of gypsum wallboard and accessories.

By Mr. KECK:

Q. Does L & W Supply Company have any connection whatever to the United States Gypsum Company?

A. Yes, it does.

Q. What is that connection?

A. L & W Supply Corporation is a wholly owned subsidiary of United States Gypsum Company.

• • • • •

[8470] Q. When did you first—excuse me.

Have you ever had authority, pricing authority of any kind with respect to gypsum board, the subject of this suit?

A. Yes, I have.

Q. And when was that?

A. That began in November, 1968.

Q. And continued until when?

A. And continued until August of 1970.

• • • • •

Q. Can you describe briefly the duties of the Director of Marketing Policy, as you knew it, in the United States Gypsum Company?

A. The duties of the Director of Marketing Policy as they were described to me when I took the position, and the duties that I had, were to prepare price action proposals on all of the company's products, based on [8471] analytical information that was generated within our staff, and based on the recommendations that came from the various divisions and the field, and then to implement and administer those price changes. And, in addition to that, I had an assignment to seek new ways, new ideas, in the area of distributing our wallboard and related products.

Q. Who did you succeed in that position?

A. I succeeded Mr. Baldwin in that position.

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[8472] Q. Do you recall whether or not you were given any instructions with respect to whether you had any special responsibilities in this job in developing new and different ways of selling gypsum wallboard?

A. Yes, I do recall that. There was considerable emphasis on that aspect of my job.

Q. Who did you receive those suggestions from?

A. I received the briefing on that aspect of my assignment from Mr. Watt.

Q. And can you tell us in substance what he told you at that time?

A. Well, Mr. Watt informed me that there had been a committee working on the subject for the past year or more. He informed me that the committee had brought about through their recommendations two trials, the two trial experiments in the market that he described to me. One was on the West Coast in California, in the San Francisco Bay area, and the United States Gypsum Company had organized what they called the Bay Area Supply Division and the Bay Area Supply Division was operating in the retail wallboard distribution business in that area of California.

He also described to me an experiment that was going on in St. Louis, in which we had an arrangement with [8473] a number of contractors that had reorganized to one drywall contractor or drywall applicator organization in the St. Louis market, where we were experimenting and learning about that phase of the business with an eye to reaching further toward the end use of the product that we manufactured, United States Gypsum Company manufactured.

Q. What did you understand from those suggestions that you were expected to do in that area?

A. Well, I understanded—excuse me. I understood that I was to carry on this activity with the idea to bring about whatever progress or change that could be made within the industry.

Of course, at the same time, it was explained to me this current state of affairs with regard to the traditional manner in which we had been conducting our wallboard business and the

fact that the trends were all going the wrong way. So the idea was to look for a new approach and to bring about recommendations to provide, to implement these new ideas when we got them fully formulated.

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[8479] Q. Did you, at any time, while you held the position of Director of Marketing Policy at Chicago, ever engage in price verification relating to gypsum wallboard?

A. No, I did not.

Q. Did anyone ever call you to verify prices of gypsum wallboard, any competitor?

[8480] A. No.

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[8482] Q. Now, let me refer in point of time to December 27, 1973. Am I right in thinking that the work you are now describing has ultimately resulted in a network of some 55 specialty distribution centers?

A. Yes, it has. Or, yes, it had.

Q. Now, I'd like to take up some of the steps which you arrived at that point.

Would you go on now from the organization of this committee. How did it proceed? How did you do it?

A. Well, I haven't yet come to the committee. We, as I mentioned, we had these two trials. And later on we added another trial of this type in Colorado, and a further trial of this type in the State of Ohio.

Now, in evaluating the results of these trials, we found that we did not believe that the concepts we were using were going to be workable on a nationwide basis.

For example, the Bay Area Supply Division was what you might term as a company store. United States Gypsum Company, through this supply division, was marketing wallboard products like an independent dealer would market his products. But they were marketing them as U.S. Gypsum Company with all of the corporate administrative and staff accounting, with all of that type of organization behind it.

[8483] We also found that from our experience in St. Louis and Columbus, where we were working in the applicator trade,

our studies began to reveal that there were literally thousands of wallboard applicators. And their business, their type of business, did not lend itself to becoming a big business. So we thought that it wasn't practical to pursue the idea of becoming the world's biggest drywall applicator, so we saw that that approach was a low, although the concepts were appearing to be successful, it was not one that we could expand upon.

So, at that point we reformed a committee to go forward.

Q. What does the "L" and "H" in L and H Supply Corporation mean?

A. L and W.

Q. L and W. Excuse me.

A. Well, it was picked out of the air. But I suppose it was for Leonhardt and Wallace. Leonhardt being the planning manager, and myself, who had the assignment in marketing policy.

Q. All right.

Now, proceed with the development of this briefly, but cover the significant steps.

A. Right.

Well, the committee, based on the information that [8484] we had gathered, felt that it had reached a point where we could recommend to the company management that we can go forward in participating in other areas of the wallboard business. And, the area that we felt we were competent enough to proceed in was in the specialty dealer business.

We prepared a proposal to our management that we make some trials in this business. And those—that proposal was accepted. We opened our first trial. We went forward and ultimately to where we are today.

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[8494] [Jury not present.]

The COURT. Gentlemen.

Mr. BARTLIT. Two very brief points, Your Honor.

Number one, the Court has from time to time on the record admonished the prosecutor about indicating openly skepticism and disbelief in the testimony of a witness. By my observation—and I admit I can't see anything that goes on—it is my

view that during the examination of Mr. Baldwin by Mr. Fricano he was overdoing it in the sense of when he got an answer he didn't like, saying oh yeah, okay, and making facial expressions and generally indicating through sarcasm and little comments he didn't believe the witness. It is too late to do anything about that with regard to Mr. Baldwin.

I again respectfully hope—there is another point, Your Honor, if the defendant stands up and objects to every little remark, the Court becomes like, as I put it, a zoo; the thing progresses slowly and it doesn't help anybody and I hope that sort of conduct can be controlled, if not by Mr. Fricano, by the Court.

Mr. FRICANO. I categorically deny his comment.

The COURT. Some of us have faces [8495] that we shouldn't play poker. What we think shows up on our face. I hope I don't do that, but it is very possible. I think Mr. Fricano doesn't do anything like that intentionally and I have not noticed it, but I would hope everybody would attempt not to indicate feelings concerning testimony of a witness by facial expressions, by gestures, by laughter or by anything else.

Mr. BARTLIT. The statement——

The COURT. I say that, and I say that in a general way. I believe that the dignity, decorum and courtesy which traditionally characterize the courts of civilized nations are not simply formality. They are essential to an atmosphere in which justice can be done.

That is not original. I am reading from the Code of Trial Conduct of the American College of Trial Lawyers and I would hope that everybody would recognize we are really—nobody is trying to win cases here. Well, the defense is trying to win. The Government should be interested in seeing that justice is done.

Mr. BARTLIT. Your Honor, it is for that precise reason I raise the point, because the case should be decided by the jury's perception of the witness' testimony and not what they think some lawyer thinks.

If I may, when Mr. Fricano says, "Well, you sure are some kind of statistician," it is hard for Mr. Fricano [8496] to deny he meant to show skepticism when he made that remark.

The COURT. He is an emotional person. Those of us who come from closer to the Mediterranean than those of you who come

from farther away, we tend to show more emotion. Mr. Thorson would not come from very close to the Mediterranean, so he wouldn't have that same problem. But everybody should make a great effort to control that sort of thing. I can't do much more than that.

The other alternative would be for everybody to come in wearing a pillowcase and that wouldn't be conducive to a good trial.

What is the other matter?

Mr. BARTLIT. I think there may be situations—and I agree it is not the Court's job to watch lawyers or anything, but there may be situations that clearly go over the line and I would urge that the Court act.

Mr. FRICANO. It is interesting to know how does Mr. Bartlit see my face, when he stands behind me? He has been consistently in one spot in the courtroom and I think it is in back on that bench. He has very good eyes.

Mr. DELONE. I don't want to get into this argument, but I sat there this morning and heard gasps and sighs and groans from Mr. Fricano. I don't say it is [8497] deliberate, and I don't think he is conscious of it, but he has plainly indicated in my hearing—and I think that is the jury's hearing—he has plainly indicated his disbelief of the witness' answer. I, myself, in fairness to Mr. Bartlit say that, in light of Mr. Fricano's denial and the statements of Mr. Bartlit.

Mr. FRICANO. At least Mr. DeLone is not saying he can see through the back of my head. I would like to know if Mr. DeLone has been quiet during the trial. Most of the noise I heard came from that chair, laughing, gasping and sighing and openly to the jury, too.

The COURT. I am not placing any blame any place. I say this: If I do anything like that, it will be subconscious, and if anybody calls it to my attention, if I do something like that, I will tell the jury.

Certainly, I meant nothing. I didn't mean to indicate anything at all by anything like that. I hope I have not done it.

[8498] Mr. BARTLIT. Your Honor, I am raising this now outside the presence of the jury in an effort to avoid a controversy before the jury. If it comes down to the point where I have to become—move my birthplace in order to defend my client

properly, I will do it. So be it. I don't think that has to come to pass.

The COURT. I have asked everybody not to do that. If it comes to my attention anybody does apparently go over that line, I will ask them not to do it.

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[8523] By Mr. KECK:

Q. Well, now, were you proposing that you go ahead and have more company stores? Was that your concept or what concept came out of this?

A. No, we were not proposing to go ahead and add distribution on that basis, and the reason we were not was because in developing the information for this chart, we found that each function clearly carried its own financial weight in the distribution within the distribution channels of the wallboard industry.

Now, had we proposed——

Q. What does that mean, each carried its own weight?

A. Well, as you see, each function that we were able to isolate, where each function made a sale, they had cost and they had profit and they had investment.

Q. You mean a $43 board sold by a manufacturer resulted in a $56 sale by the dealer, resulting in a $130 sale by the applicator?

A. Yes, that's correct.

Q. Well, now, in the presentation or the concept you were attempting to sell your top management, what were you proposing?

Were you proposing that you become just another distributor or just another applicator or did you have a definite concept?

[8524] A. We were proposing a trial in the distributor or dealer business area.

We thought that we could gain the information necessary to go further with somewhere between five and eight trials, and we proposed it in this fashion because, of course, it would require a considerable investment on the part of the company, and the total corporation was looking at the manufacturers' bar chart situation, and we felt that they might not be too inter-

ested in making further investment if we grouped the two together.

So we felt that we had a better story to tell if we kept the dealership or the distributorship separate. It seemed like they may have been doing better than we were.

Q. Well, in the subsequent implementation of that, you have kept L & W Supply separate, have you not?

A. Yes, we have.

Q. So you were proposing a specialized kind of distribution center to cater to the applicator trade?

A. That's correct. Yes, we were.

Q. You wanted how much of a commitment?

A. At this time we asked for two and a half million dollars.

Q. And you got it?

A. Yes, we did.

Q. And what did you do with it?

[8525] A. We used it to open several dealerships. We tried to scatter them throughout every geographic region of the United States and, as a matter of fact, I believe we had ten before we had used up the funds that they had allocated to us.

Q. And, then, did you go back and get more commitment and build more centers?

A. Well, yes. At that time we were prepared to make our next proposal, which was to go forward and to ask the management for a larger commitment.

Q. What kind of a center is this? Does it just warehouse board so that the applicator can come get it, or does it have to do more to it? Is there service connected with it?

A. This distribution business is primarily—primarily a service business. It is not what you would consider to be a normal warehouse business.

We take the material into our center, and we deliver it to the job site, to the place where the applicator puts it on the wall.

It is a service. It is this service for which we were able to obtain the markup from $43 all the way up to $56 by providing that service, and that's—you asked me about other activities in this area by USG, and what we knew about other manufacturers, and it was more or less [8526] a typical warehouse function, or that's the way we saw it, where they just tried to get their material warehoused a little closer to the market.

Q. Were you trying to copy Georgia-Pacific or were you trying to do something different?

A. We had our own problems, and we were trying to work with what we had, and we felt that if we could find the most efficient way to get wallboard from out of the quarry onto the wall, that we wouldn't have very much difficulty fitting the other pieces together to be competitive.

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[8377] EDWARD L. BUSCH, called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

By Mr. HERRING:

[8378] • • •

Q. You are employed by United States Gypsum Company, is that correct?

A. That is correct.

Q. And you are presently General Manager of the Southern Construction Products Division of United States Gypsum?

A. I am.

• • • • •

[8378] • • •

Q. You have held the job of General Manager of the Southern Construction Products Division since January, 1966?

A. That is right.

Q. Is that right?

A. That is correct.

Q. Would you tell us just briefly what your job positions were with U.S.G. prior to that time?

First of all, when did you first start with U.S.G.?

A. I started with U.S.G. in 1948 in January in Los Angeles as a salesman.

I had a year and a half in Chicago as an Assistant Product Manager, went back to the West Coast as District Manager of Sacramento for three years and then various assignments in Los Angeles as Division Manager until 1963, at which time I went to Chicago as General Sales Manager.

Then, in 1966, down to Atlanta, Georgia, as General Manager.

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[8579] Q. Now I would like to move back to 1966 and ask you some questions about that period of time right after you took [8580] on the job as General Manager of the Southern Division.

At that time what was your policy regarding selling prices for gypsum board products?

A. Disastrous. Actually, our policy was that we would meet no competitive conditions that existed in the field. And, nor would we meet any policies other than those of our own bulletin.

Q. Generally speaking, did that policy remain in effect during the year 1966?

A. It did. It remained for the entire year of 1966.

Q. Do you know whether your competitors were selling at published prices in 1966?

A. I know that they were not and I also know that their policies were different than ours.

Q. And was this true of—well, tell us who was this true of, all of your competitors?

A. Well, we had three major thrusts in the competitive situation that existed in '66. The most important and the major thrust was by Georgia-Pacific-Bestwall, who had acquired—or Georgia-Pacific, who had acquired Bestwall. They had some 30 outlets in our division, of which 20 stocked gypsum board, and they—their individual yards seemed to operate as centers with an apparent authority for pricing policy.

The other number two largest threat was the one [8581] plant producers, whose both pricing and distribution policies were different than ours, and the last was some specific major thrust by some of our—some of the multi-manufacturers.

Q. When you say these people were threats, do you mean they were engaging in price cutting during this period of time in 1966?

A. That is correct. That is what I am saying.

Q. So you encountered price competition in 1966 from both single plant producers and multi-plant producers, is that correct?

A. That is correct.

Q. Did you encounter any other forms of competition in 1966, other than price competition?

A. Well, I mentioned price, and to put it into focus properly, the Georgia-Pacific pricing was somewhere in the neighborhood of one to two dollars below our authorized bulletin prices.

The one plant competitors had the same pricing philosophy, plus they trucked, as an example, two trucks at our carload price, or trucked carload into our zone at 90,000 pound carload price.

And in the case of the multi-manufacturers, we lost a considerable chunk of business for varying reasons and, specifically, we lost 22 yards of Wickes yards in the Carolinas and Georgia to Flintkote.

[8582] We had enjoyed a sizeable portion, perhaps as much as 50% of the West Yards, which is Associated Distributors in Georgia and Alabama and part of the Carolinas, and we lost that business to National Gypsum Company.

And one of our strongest accounts, Schuman with 18 line yards throughout, again, Tennessee and Georgia, we lost that business to Georgia-Pacific.

• • • • •

[8592] • • •

Q. At the time of your August 3, '66, memorandum to [8593] Mr. Rembert, who was your principal competitor in the market?

A. Georgia-Pacific.

Q. And I believe that you said that Georgia-Pacific had warehouses at which they stocked gypsum board; is that correct?

A. At that time, they were stocking gypsum board at the 20 of the 30 warehouses they had in our area, but they were selling gypsum, all the warehouses, in other words, so just not stocking.

Q. Did this give them a competitive advantage?

A. Yes, it certainly did, in several areas. One of the areas is that they could give immediate delivery at a warehouse, particularly where they had their warehouses. They could pool truckloads with other items, primarily plywood or doors or

whatever else they might have. They were able to have some special sales incentive for selling higher priced items, along with gypsum wallboard; and, last and probably not least is that the dealer didn't have to buy a full carload and put it in inventory. He could buy whatever his requirements were, part truck filled out with something else, or certainly at truckload.

Q. You referred to pool—pooled shipments with plywood and doors. What did you mean by that?

A. Well, if a dealer placed a—particularly a [8594] dealer filler, would decide that he didn't need a full truckload of gypsum, which is the way we sold gypsum, in full truckload or carload, he would say that he would order some plywood along with a part truckload of gypsum, or whatever other items that were being sold by Georgia-Pacific at that time, and receive the full truckload price for his purchase.

Q. Was United States Gypsum Company able to offer this service at that time?

A. No. We were unable to offer that service.

Q. Now, you also referred to special incentives with other products. Did you mean incentives with regard to price?

A. Well, we ran into several situations whereas—and there was no pattern whatsoever, but the reports that we have documented, I am sure, show a five percent discount on a full truckload, whatever was in it, or a special that may have been inaugurated for two or three days' sale to move inventory—yes, special incentives, is what I mean, in that nature.

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[8606] Q. Mr. Busch, you recall, yesterday, I asked you whether your competitors continued to cut prices in 1966 and to take business away from you and whether you were continuing to lose market share, to lose business and to lose market share to your competitors into 1967 as a result of this price cutting and other competitive activity.

And then I had asked you if you had communicated this problem of your declining market share to Mr. Rembert. Do you recall that?

A. Yes, I do.

Q. And I believe you said that you did communicate to Mr. Rembert about this.

A. In a written document; yes.

Q. And I would like you to look at USG Exhibit 401 and tell us what that is.

A. This is a report to Mr. Rembert regarding the [8607] industry position outlook for 1967. It points out——

Q. Well, just, if you would, identify it, and let us have the date of the document.

A. The date is January 20, 1967.

• • • • •

Q. Mr. Busch, is this the memorandum that you just spoke about, that you wrote to Mr. Rembert?

A. Yes, it is.

Q. And what was the reason for your writing this memorandum?

A. Well, we had had corporate goals for the division set at a specific amount of gypsum board footage, and it was based on a 30 percent industry position, which we had enjoyed in the previous years. And we estimated that the third quarter of that particular 1966 was going to come in at approximately 30 percent, and, when the figures became available, they were more in the neighborhood of 25 and a half [8608] percent. And, obviously with the drop in industry position, I felt it was necessary to explain to our company, really, what the true outlook was for 1967, and to tell them something about what the competitive situations were, and to get a sense of direction from them.

Q. Were you making any prediction at that time as to what your market share was going to be in the fourth quarter of 1967–1966. I'm sorry.

A. We estimated, at that time—and this letter was written in January, about 60 days before we could get our market share—that it could be as low as 20 percent.

Q. So you were talking about a four and a half percent decline for the third quarter of 1966 and approximately a predicted 10 percent decline for the fourth quarter of 1966; is that correct?

A. From the early 1966 level, yes.

Q. And what was the purpose of advising Mr. Rembert of this?

A. Well, the purpose was to get a sense of direction, number one. Number two, to alert the company as to what the true facts were for the southern division and to outline the reasons for the decline.

Q. And what was the result of the memorandum, if any?

A. The result did have impact and, on a very limited basis, we were able to meet a few competitive situations as [8609] early as the first quarter of the year.

Q. Now, did this change any further during the course of the year?

A. Specifically, yes. By midyear, as I recall, at one of our general managers' meetings in Chicago, it was determined that we would—that the corporation would welcome and actually suggested strongly that we make formal recommendations to them to meet competitive situations, particularly of the multi-plant producers.

Q. Now, were these recommendations to meet competitive situations in individual instances dropping the price to particular customers?

A. They were.

Q. Now, at this time, in the middle of 1967, did you have any authority to meet particular competitive situations on price?

A. No authority; no.

• • • • •

[8610] Q. Did there come a time when that changed?

A. Yes, it did. By October, November—and I can't say which date exactly—we did receive authority to meet competition down to a 5% limit.

Q. How long did that authority last?

A. That specific authority to meet competition lasted in varying degrees through May, June of '68, at which time the authority again was broadened.

Q. And how was it broadened?

A. We were able to meet competition down to 10%. And later that year, in the fall, meeting competition down to 15%.

Q. Now, you are talking about the year 1968; is that correct?

A. I am not talking about '68, because the first authority was the 5% in late '67.

Q. Now, I'd like to ask you, Mr. Busch, were the majority price reductions to meet competition in your division after the end of 1967 approved by you as Division Manager without having any need to send them on to Chicago?

A. We were the final approval within that authority, yes.

Q. And did this in fact account for the great majority of approvals that were granted for price reductions after [8611] the end of 1967?

A. Very definitely so.

Q. Now, after the end of 1967, in those cases, where you had to seek approval from management in Chicago because it was beyond the guidelines that were given to you, were there any instances where a recommendation that you made to meet a lower competitive price was turned down?

A. To the very best of my knowledge I have never had a turn-down in Chicago since '67.

Q. So you were either approving these yourself—these price reductions to meet competition—you were approving them as General Manager of the Southern Division in the great majority of cases, and in those that you did have to send on to Chicago, because they exceeded your guidelines, you don't have any recollection of any instance where there was ever a turn-down; is that correct?

A. No, I do not.

Q. And does your recollection in that regard extend from December 1967, when you were first granted this authority, on through to December 27, 1973?

A. Yes. That would be correct.

• • • • •

[8612] Q. So, in other words, your role as a pricing decision maker was expanded in late 1967 to approve price reductions: is that correct?

A. That is correct.

Q. And you retained that authority since that time?

A. Yes, sir.

Q. Now, have you or did you, during this period of time from December 1967 through to December 27, 1973, did you further delegate that authority?

A. Well, everything is in the way of degree. When I first had received the authority, why I considered myself as the absolute authority. And as the tempo of competitive situations seemed to spread, it was absolutely necessary that I do that. And the answer to your question is: Yes, we delegated responsibility.

Q. Now, can you tell us to whom you delegated this responsibility?

A. Initially the responsibility was delegated by me to the sales and/or marketing manager at the time. And too, of course, our pricing policy manager.

* * * * *

[8613] * * *

Q. Mr. Busch, after this authority had been delegated [8614] to your sales manager, you said—Is that correct?

A. That's correct. And my marketing policy manager.

Q. So, in effect, after that time who had the final authority with respect to the part that had been delegated?

A. Well, obviously the two people that I just mentioned. I would be remiss in not saying that as the tempo increased that authority within the guidelines of the respective managers went down another step, which was to the area sales managers.

Q. So it went all the way down to the area sales managers, which were whom?

A. Well, there were three of them. Four of them at the time. One in the Southwest, one in the Southeast, and one in the Seaboard.

And while we had another one, which was Commercial Systems, it was a little bit out of the gypsum wallboard ballpark.

Q. Now, when you were delegated that authority to meet competitive lower prices in late 1967, this was contrary to the policy that had been in existence at the time you became division manager in January, 1966; was it not?

A. It was 180 degrees reverse, right.

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[8616] Q. So all the policies that had been in effect, these three policies that had been in effect when you became Division Manager, had all been changed by 1968; is that right?

A. That is correct.

Q. What happened to credit terms? Was there any change in credit terms between the time you became Division Manager and this period in 1968?

A. Yes. Our standard credit terms had changed, as I recall, in April of 1967, at which time the Kaiser Gypsum Company came in with what we call the fast three. Or, a 5% discount. Three percent additional discount for paying their bill within the 15 days of the date of the invoice.

[8617] Q. Now, after you were granted this authority to meet lower competitive prices up to three 5 percent discounts of the published price in the fall of 1968, can you tell us what happened to the competitive situation in the southern division thereafter, in 1968 and into 1969?

A. Well, the competitive situation in '68 and into '69 really was more of the same, merely at a very—more quickening and intense degree. The competitive situation still remained, primarily, Georgia-Pacific, Bestwall, the one-plant producers, and, to a lesser degree, the multi-plants manufacturers.

Q. Can you give us any idea of how many instances there were where you were meeting specific competitive situations in the end of 1968 and into 1969?

A. To the best of my memory, they went from about 100 in 1967 to about approximately 800 in 19—the end of 1968.

Q. Were there any published price increases that were attempted in 1969?

A. There—and I will have to answer that in the affirmative. I am unfamiliar with the numbers or the dates of them. Yes.

Q. Do you recall whether the ones that were attempted succeeded?

A. I recall that very specifically, and the answer is no.

[8618] Q. What happened?

A. The increases really were subjected to the lower competitive prices, still being continued after a specific date of the increase, extreme job protection, and, between the two, it nullified any effect on the price change.

Q. Was there any one particular competitor that stood out with respect to the job protection competition?

A. There was no one competitor. There was several competitors that were involved on job protection, particularly, and they were the—again, Georgia-Pacific—again, one-plant pro-

ducers; and in the multi-plant manufacturers was National Gypsum Company.

Q. And did you continue to face competition from the other multi-plant producers at this time?

A. Very definitely so.

Q. All right. Now, let's move to 1970, and let me ask you what happened to prices in 1970.

A. Generally, prices in 1970 hit the all time low for the period in which we are speaking, '67 through '73.

Q. Do you know when in 1970 this all time low was reached?

A. It was during the second quarter.

Q. Do you have any way of measuring the average price that you received for the product, for gypsum wallboard?

A. On a mill net basis.

[8619] Q. And what is this mill net basis that you speak of? Could you explain that?

A. Well, the mill net basis is the cost of the product at the plant, plus freight, and less—well, actually, it was the cost of product plus the freight to destination, and the mill net would be the difference between the freight and the price in—which we were able to obtain in the field.

Q. So when you speak of a mill net, you are talking about the price to the customer, less the freight; is that correct?

A. Price to the customer, less the freight at the mill.

Q. And do you have any idea what happened to your mill net price in 1970?

Let me ask you, did you know what your mill net price was in, say, the third quarter of 1970?

A. As I recall, the mill net price was approximately $30.

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Q. Do you know how that compared with the mill net [8620] price early in 1970?

A. As I recall, our mill net in the second quarter was about 35.25 roughly, and, by the third or fourth quarter, it was about $30, and so it was about five and a quarter off.

Q. Were there any areas in the southern division where you were unable to compete by virtue of the level of prices in 1970?

A. Yes. We were—we were—we sold by truck into the eastern part of Texas, northeastern part of Texas. We would have been

selling at the low price. We would have been selling at about a dollar and a half below our specific mill net in that particular area. As I recall, the low price was about $27.50, and our costs were about $26.

Q. So what did you do—did you continue to sell into that area?

A. Well, first of all, it is against the law to do that, and the second thing is we didn't do it.

Q. How, do you recall that Republic Gypsum Company attempted to increase prices in 1970?

A. Yes, they certainly did.

Q. And did you learn of that at the time of Republic's attempt to increase?

A. We learned of that, of course, as soon as the announcement hit the field. It became pretty obvious that they were going to increase their price.

[8621] Q. Now, as a result of that, did you make any recommendation to your management?

A. Well, yes, I did. Do you wish me to elaborate?

Q. Yes, would you, please?

A. The price that was announced by Republic, to be effected some time in June, was—or, excuse me, in May, was to go from the market price, which was in the market, to $36 a thousand, and that was followed by some other competitors with an effective date of June 15, as I understand, and it was followed by us as late as May 28, in which the strong recommendation that I had was that we go to $32 and particularly that portion of Texas with the $36 ranging in the peripheter.

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Q. This announcement of recommendations was for a $36 published price for half-inch wallboard; is that correct?

A. That is correct.

Q. At that time, what was the low market price for [8622] half-inch wallboard in that market?

A. The lowest price in Texas was $24, some at $25, and the majority of the loads were $26.

Q. So this, in effect, was an announcement of a price about 10 to 11 to 12 dollars?

A. According to where you start, $10, down to a low of $12.

Q. Above what was in the market at the time; is that correct?

A. That is correct.

Q. Now, why was it that USG announced an increase to $32, rather than to $36, as Republic had announced?

A. Well, I would hope it was because of some strong persuasion by me.

Q. Well, what were your reasons?

A. Well, my reasons were twofold. First of all, you asked me if there had been any previous announcements over the years, and I answered yes, but I don't know when. As I recall, they were in the amount of two dollars a thousand, plus or minus, and they never held, and, in 1970, I had been with the company in some sort of capacity, in sales, from 1948, which was 30—almost 22 years, and I never heard of an increase that would stick that would go to $10.

Q. Now, did anything happen with respect to USG's published price after your announcement of a price increase [8623] to the $32 level?

A. Well, as I mentioned to you, the first thing was that the effective date that we announced in June—I believe is in June—I believe it was June the 8th—was moved to July the first for competitive reasons.

Q. What were the competitive reasons for moving it to July the first?

A. Well, as I recall, at some time in late May, or it could have been early June, that Georgia-Pacific-Bestwall announced their price increase, and the effective date on that was July the first.

To further answer your question, it became pretty apparent that, by mid July, that it didn't matter what the price announcement was, or bulletin. There was no action in the field of any significance that would warrant our feeling that the price would take effect, and so, at that time, in July, again, we felt that we would roll that price back to the price in effect prior to the announcement and then announce that, again, that these would be our prices effective September 21.

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[8626] Q. Now did United States Gypsum ever lower its price to any particular customer other than to meet what you believe to be a competitor's lower price?

A. I can answer that very definitely to the—that, when you are speaking of USG, you are speaking of my decision, and the answer is we did not.

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[8634] • • •

By Mr. HIERING:

Q. Mr. Busch, would you tell us what the purpose of—well, let me strike that.

Did you also have prepared under your supervision and direction a map of the United States depicting the information that's contained on U.S.G. Exhibit 406A?

A. Well, the answer is yes, sir. I certainly did.

Q. Is that the map, Mr. Busch, that you were referring to?

A. Yes, that's the map which I was referring to.

[8635] Q. Now, I see there are two circles on this map. Would you tell us what they are?

A. Well, yes. One of them takes a five hundred mile radius around Pittsburgh, Pennsylvania.

Q. That's this?

A. This one over here, and the other one takes a five hundred mile radius around Duke, Oklahoma.

Q. What are the dots that are included in these two circles?

A. Well, those are the gypsum plants, both U.S. Gypsum and competitive plants, that are located in those areas.

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Q. Now, could you explain the labels above the two circles, please?

A. Oh, yes. One is the U.S.—percentage of U.S.A. [8636] population. In other words, the percent of the total United States that lives in those areas.

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The WITNESS. To answer your question, again, it depicts the percentage of people living within those areas.

By Mr. HIERING:

Q. If I could just interrupt, for example, here under the heading "Pittsburgh Circle," the figure 53.3. That's the per-

centage of the total population of the United States that is located within this Pittsburgh Circle, is that correct?

[8637] A. Would you like me to explain this?

Q. Yes, if you would, please.

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The WITNESS. All right.

We took the Department of Commerce 1972 County-City data, and took it for every county and city within this area, and came up with a percentage of total people within the area.

Second, we decided that we would take the total number of gypsum board plants in each one of these areas and spot them and list them and tell you what they were.

U. S. Gypsum so happens to have 12 in that area.

Then we took the people per board plant, the number of people, obviously, divided by the number of [8638] plants, which came up with a total board, people per board plant, showed 3,388,000—roughly—500 people.

Then we got down to Duke, Oklahoma, and we did the same thing. We took the percentage of population which lived in this area, which was 12.3.

We took the number of gypsum board plants, which is 15, and which U.S.G. has 3, and, then, we took the people per board plant, and listed that, which is 1,660,000.

Now, do you want me to draw a conclusion? That's the map.

By Mr. HIERING:

Q. Let me ask you just one more question about this. Does it show in effect that there are more than twice as many people per board plant in the Pittsburgh circle as there are people per board plant in the Duke circle?

A. Yes, and that's very simple. I told you how we arrived at the people per board plants, dividing it by the numbers of plants, and if you multiply one million six by 2, you will come up close to 3,000,000-something, so there is twice as many people that live in the Pittsburgh area.

[8640] • • •

Q. Referring to the Duke circle, was there an overcapacity situation in that area?

A. That's the problem. There is an overcapacity situation in that area.

Q. With respect to the production capacity for gypsum board products; is that correct?

A. Yes, that is correct.

The COURT. What do you mean by that? Do you mean you make more than you can sell?

The WITNESS. That means the plants [8641] can produce more than they can sell in that area, yes, sir.

By Mr. HIERING:

Q. And did this overcapacity situation in the Duke circle have any effect on the price levels in that area?

A. Well, there are two situations that I think have to be answered on that.

Q. If you would, please.

A. Number one: The overcapacity certainly does have an effect on lower prices.

But, even more important, the plants in the Duke circle, all of these are quarry plants with a rock quarry right close to the plant, with the exception of USG's Galena Park plant that brings rock from Mexico. As compared to the plants that are in the Pittsburgh area, which go into mining and seaborne rock. And the rock cost has considerable effect.

Q. So both the sparcity of population in relation to the plants and the cost had an effect on prices; is that what you are saying?

A. That would certainly be my consideration, yes.

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[8659] CROSS-EXAMINATION

By Mr. FRICANO:

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Q. And you were responsible for——

A. Bottom third of the United States.

[8660] Q. That is a pretty big piece of land, isn't it, this whole piece right here?

A. Yes, sir.

Q. How many millions of dollars do you think you account for in each year of sales?

A. We were any place from 44 million in '66 to 85 million dollars this last year.

Q. And you had a sales force that covered this whole area?

A. I did.

Q. And they reported to you what they believed to be competitive situations in the marketplace, is that correct?

A. Through channels.

Q. Through channels right up the line?

A. Right.

Q. And not once did you have to check a price, did you?

A. Not once did we not have to, but not once did we.

Q. So for purposes of compliance with any law of the United States of America, you didn't have to pick up the telephone and call a competitor, did you, Mr. Busch?

Did you, Mr. Busch?

A. The answer is we did not do that.

Q. That is not my question, sir.

Mr. HIERING. Well, Your Honor——

[8661] The WITNESS. Restate the question, if you will.

By Mr. FRICANO:

Q. My question was: Not once since you took over at the Central Division, millions of dollars worth of sales, not once to comply with any law of the United States did you have to pick up the telephone to call a competitor?

Mr. HIERING. I object to that as asking for a legal conclusion on the part of the witness.

The COURT. Change it to feel you would have to.

By Mr. Fricano:

Q. Did you feel that you would have to, because you did not?

A. No, I did not feel that we would have to.

• • • • •

Q. Do you know whether or not other officers of your corporation, United States Gypsum, did contact competitors on prices?

Mr. HIERING. Could we have a period [8662] of time, Your Honor, please?

Mr. FRICANO. At any time from 1960 to December 27, 1973.

The WITNESS. I have to answer that in two ways.

The first is, the only knowledge I had was in 1963 to 1966, when I was in Chicago I had knowledge that there were certain people authorized to contact competitors for verifications and I also know that in 1966—this is part two of my answer—that there was no pricing authority in the Southern Division from a standpoint of any deviations from our bulletin. Therefore, verification would have been stupid.

By Mr. FRICANO:

Q. Verification would have been stupid? There would have been no reason for anybody in that time period, particularly you, to pick up the telephone and call a competitor to verify. Is that your testimony?

A. That is my testimony. It would serve no purpose one way or the other.

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[8666] • • •

By Mr. FRICANO:

Q. Did you know that Mr. O'Brien, for a period of years prior to the time he came down to Atlanta to be your pricing man, was a telephone contact for competitors at headquarters in Chicago?

A. Yes, I did.

Q. And was it at this time that you told him to stop?

A. The time is 1966, January 15, when we started a new division, at which time both of us were new on our assignments, both of us know that there was to be no deviation from price.

I assume you're listening.

Q. I am paying strict attention to you, Mr. Busch. I can do a couple things at once, so why don't you keep talking?

A. And, therefore, the answer to your question was [8667] it was decided, among O'Brien and myself, that it would be useless to have any further verification since we were a part of an apple and not a whole; further, that there was no authority at the division level.

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[8680] • • •

Mr. FRICANO. May the witness have Government Exhibit 22, please.

By Mr. FRICANO:

Q. Do you recognize No. 22?

A. Yes, I do. And it seems to me that every salesman in the U.S.G. Company has had this document.

Q. And you have had The Legal Aspects of Selling yourself; haven't you?

A. Yes. As a salesman I did, and as a District Manager. And I am familiar roughly with what the contents are.

Q. And it says that it was—It is dated, I guess—Oh, yes. On the first page it says: "Revised September 1960."

Is The Legal Aspects of Selling, revised 1960, was it in effect throughout the period from 1960 to December 27, 1973, sir?

A. This particular copy bears that date. I am not certain, but I know that we still have a Legal Aspects of Selling to our sales organization.

Q. And does the document which you have back at your office, does it say on page 11 thus:

[8681]

> It is permissible for the company to meet competitive situations as to price, policy, service, terms and conditions of sale, either wholly or in part. The facts justifying such a meeting of competitive situations necessarily can only be obtained in the field from the trade.

A. I don't have to read that. The answer is "yes."

• • • • •

ROBERT J. DAY

DIRECT EXAMINATION

[8733] By Mr. KECK:

Q. Please state your name and home address.

A. My name is Robert J. Day. My address is 14 Charleston Road, Hinsdale, Illinois.

Q. By whom are you employed?

A. By the United States Gypsum Company.

Q. What is your present position with that company?

A. I am Vice-President of Marketing.

Q. What, generally, are your duties as Vice-President of Marketing?

A. Generally my duties are to set the tone, strategy and policy of the marketing of our products.

Q. What do you mean by setting the tone and strategy of your marketing policy? Would you amplify that?

A. This is to establish the direction of our marketing in areas such as advertising, new product development areas, market research, marketing policy, traffic and physical distribution and national account selling and so on.

Q. How long have you been Vice-President of Marketing?

A. Since February, 1974.

Q. Would you briefly recount your employment history with your company prior thereto?

A. I joined the company in January, 1950, and was in Sales and Field Sales Management assignments, about six of them, between then and 1958, except for two years when I was [8734] recalled to the Air Force during the Korean War.

After 1958 I was transferred to our Chicago headquarters in the Marketing Department and held a variety of jobs as Marketing Manager, Product Manager or Merchandise Manager for various product groups through 1965.

In January, 1966, when the company was reorganized, I was appointed Director for the Product Management for the company and I held that job until August, 1969, when I was made General Manager of our Western Construction Products Division and I held that job until February, 1974.

• • • • •

[8785] • • •

By Mr. KECK:

Q. Mr. Day, we have heard a number of times in this trial that wallboard is wallboard.

From your experience in this industry, is that true?

A. Well, it all depends on what you mean by it.

Of course, wallboard is wallboard in that there is a half-inch commodity-type product which is most commonly used

and which is the largest seller, and we are interested in selling every foot of that for every purpose that we can.

But it is also a lot of other things. It's, for instance, 22 different edges. It's about ten different core formulations. It's a lot of different finishes that we put on. It's about 15 different papers that are used, and it's a great many widths and thicknesses and so on.

[8786] So wallboard is wallboard, but it is also a lot of other things, and we try every day to make it more, and we are successful at that.

There are more—the higher percentage of what is sold now than ten years ago is specialized and proprietary products of various kinds, and it is a very essential part of our whole marketing effort to keep adding the value, keep making it different and making it better, so it does more jobs for us and performs more function for the customer, and that is—that's the way we earn our place in the marketplace; that's the way we compete; and it is the way that gypsum, in my opinion, has contributed more to this country, in the construction field, than just about anything you can name. It has done it well and it has done it economically.

The COURT. Mr. Day, is one company's wallboard, gypsum wallboard, the same as every other company's wallboard?

The WITNESS. Some of their wallboard, the half-inch, what we call the plain vanilla, Your Honor, which is the half-inch regular board commonly used on residences, and the largest seller, is pretty much the same company-to-company.

The COURT. In other words, it is fungible?

[8787] The WITNESS. Yes, sir, that's right, and we try, therefore, to make the difference in some other way, to make our service better, to make our reputation better, to make our quality more uniform.

There are a lot of ways we try to be competitive, even though it is the same, but you're right, it is—it is pretty much the same.

By Mr. KECK.

Q. How important is plain vanilla half-inch wallboard in U.S. Gypsum's sales today?

A. Well, of our wallboard sales, it is still over 50 per cent of it, I would say.

Q. But it is going down?

A. But it is less than it was a number of years ago.

• • • • •

CROSS-EXAMINATION

[8833] • • •

By Mr. FRICANO.

Q. Yesterday, you were testifying on direct examination, concerning the fungibility of one-half-inch gypsum wallboard. Do you recall that?

A. I believe I did have a question; yes.

Q. And now, you testified that one-half vanilla, vanilla covered—is that what you call it?

A. No, we call it just plain vanilla, half-inch regular wallboard.

Q. And you said that that accounted for a little over 50 percent of your total production is that correct?

A. Yes. I don't know the exact percentage; but it is over 50.

• • • • •

[8882] • • •

By Mr. FRICANO.

Q. Do you think it would be stupid to pick up the telephone and call your competitors to find out what a price is?

A. My personal opinion is that it is a very, very limited value to do a thing like that.

[8883] Q. You don't really need to, with the market intelligence that you get from the field, do you?

A. I place a low value on it. It could be of some value, under some circumstances, but I place a low value on it.

Q. You didn't do it while you were out there on the west coast, did you?

A. I didn't, no.

• • • • •

[8887] JAMES B. GALVIN, called as a witness by and on behalf of Defendant United States Gypsum Company, having been first duly sworn, was examined and testified as follows:

Mr. KEENE. Would you give your name to the Court, sir?

The WITNESS. My name is James B. Galvin.

DIRECT EXAMINATION

By Mr. HIERING:

Q. Mr. Galvin, would you state your residence address, please?

A. My residence address is 19W019 Normandy East, Oakbrook, Illinois.

Q. And by whom are you employed?

A. United States Gypsum Company.

Q. Since what date?

A. Since 1950.

Q. And what is your present position?

A. I am Director of Marketing Policy.

Q. And how long have you held that position?

A. I assumed that position in June, 1971.

Q. And what was your position immediately prior to that date?

A. I was Manager of Marketing Policy of the Central Construction Products Division.

[8888] • • • • •

Q. And what were your responsibilities as Marketing Policy Manager for the Central—did you say that was for the Central Construction Products Division?

A. Yes, from 1966 to '71.

• • • • •

[8901] • • •

By Mr. HIERING:

Q. Mr. Galvin, going back to the green sheet, could you tell us what the purpose was of recording the information that is contained on the green sheet?

A. There are two purposes. The first and foremost important purpose is the green sheet becomes an excellent device and our primary record by which to record field intelligence that our salesmen gather as to what the competitive situation in the market is. By having these reports, that enables managers to make better and more [8902] informed business decisions as to what to do with competitive pricing and competitive activity.

The second purpose of the green sheet is to record the basis for our reducing our price from our published bulletin prices. In other words, it is a legal purpose in compliance with the laws that deal with price discrimination.

Q. And what law is that that you are referring to?

A. I have referred to it as the Robinson-Patman Act.

Q. Now, if the green sheet is processed with the approvals, as you described, what happens next?

A. If the green sheet is processed and the recommendation is that we meet the competitive situation, as I say, it is forwarded to whomever has—through what channels are appropriate at the time—to whomever has final authority to approve the recommendation.

Q. And if it is approved, then what happens?

A. Then it becomes the basis for the Accounting Department to invoice at that lower price or to adjust to that lower price.

Q. And what is the Accounting Department authority for that purpose?

A. The P/A.

Q. And that's the pink document on the right; is [8903] that correct?

A. That's correct.

Q. Have you ever had any advice from your lawyers with respect to compliance with the Robinson-Patman Act?

Mr. FRICANO. Objection.

Mr. HIERING. I am not asking him for a legal conclusion, Your Honor. I am just asking him whether he had any advice from lawyers with respect to compliance with the Robinson-Patman Act.

The COURT. You can answer it yes or no, but you can't ask him what the advice is.

The WITNESS. Yes.

By Mr. HIERING:

Q. On more than one occasion?

A. Yes.

Q. And were there occasions when you asked specific advice from your lawyers with regard to approval of price adjustments?

A. Yes.

Q. Now, were there instances when the information regarding the competitive situation, as contained on the green sheets, raised doubts in your mind as to the accuracy or the truthfulness of the report of the competitive situation?

A. Yes.

[8904] Q. And what did you do in those instances?

A. The usual procedure is to send the file back to the initiating, or back to the responsible sales manager, and tell him that he needs to get additional information or you can't approve that particular price recommendation.

The COURT. The reason I ruled that he couldn't ask what the advice was is this:

You ask a lawyer for advice—and I like to think judges are still lawyers. If you ask a lawyer for advice—and I don't mean to derogate the advice—and he gives it to you. And, by following his advice you violate the law, it is still a violation of the law. That doesn't make it okay just because a lawyer advised you to do it. That's why what the advice was may be relevant in some situations. But, in the matter that we have before us today, I don't think it is.

By Mr. HIERING:

Q. Now, were there ever any instances when you doubted the accuracy or the truthfulness of the claim of the lower competitive price made by the customer where you check the accuracy of that claim by calling a competitor?

A. Yes.

Q. And can you give us some approximation of how many instances?

A. They were very few. I would estimate not more than [8905] ten, and probably less.

Q. When was the last occasion when you made such a call?

A. I don't specifically recall the last date on which I made such a call.

Q. Approximately when would it have been?

A. Well, it would have been—No later than 1968, and possibly earlier than that.

[8906] Q. Why did you stop making these calls?

A. Well, the reason I stopped making the calls was when I—as the year 1967 progressed, the market became increasingly more competitive, and the field intelligence we were receiving started to flow in with increasing frequency, and that, by 1968, it was—there was a considerable number of green sheet forms flowing in every week, maybe every day, so that it—in my mind, by that time, because of the very competitive nature of the market, I had all the information at hand that I needed to deal with the price adjustment requests that were coming to me and to feel that I had a good faith meeting of competition.

• • • • •

[8925] • • •

By Mr. HIERING:

Q. Mr. Galvin, are you able to tell us how many of these 90 boxes are price adjustments relating to the years 1967 and 1968?

A. Sixteen boxes of the documents cover the period 1967 and 1968. In other words, were price adjustments issued during that period.

Q. They are the boxes that are numbered U.S.G. 200–1 through 200–16; is that correct?

A. I think—Oh, that would be 18 boxes.

Q. Eighteen boxes, right.

[8929] A. Yes. Right.

Q. And so those would be, those 18 boxes would be the price adjustments with respect to which some of your—or with respect to which all of your ten or so price verification calls would have related; is that correct?

A. Yes. Those were the documents that related to the years 1967 and 1968.

Q. And with respect to the remaining 68 boxes, you made no price verification calls whatever; is that correct?

A. The remaining 68 boxes are from the period 1969 through 1973, and I made no price verification calls.

Q. Could you tell us how many of these price adjustment forms, together with the related file for each one, are included in the 86 boxes of P/A's?

A. Yes. The grand total exceeds 45,000. In fact, the number is slightly over 45,700.

Q. And how many customers would be affected by these P/A's? Not in terms of an exact number, but would it be more or less than the number of P/A's themselves?

A. I find that difficult to say. I'd say it would be less than the number, since an individual customer during this period of time probably had a series—especially if he was a good customer—a series of P/A's, it would be less.

• • • • •

[8944]

By Mr. HIERING:

Q. Would you tell us what happened to prices and price reductions to meet competition in the year 1968?

A. Well, in the year 1968 it became much more competitive in the market and the number of price reductions grew to well over, I believe the number is well over 7,000. If you take the—you can see that the competitor most frequently mentioned in 1968 was Georgia-Pacific, mentioned on 3,000 of the price adjustment green sheets.

Q. Was Georgia-Pacific your largest competitor in terms of size?

[8945] A. No, not our largest in terms of numbers of plants. They would have been number two—I mean number three in the industry. Number two after us. The largest competitor was National Gypsum, and they were mentioned on just slightly under 2,000. In both cases, a significant increase than the prior year.

Celotex is mentioned on around 1,200 of the reports.

The four other multi-plant producers were mentioned on just slightly over 2,000 of the reports and the single manufacturers were mentioned on a little under 1,000 of the reports, around 900.

Q. When we are referring to reports, when you refer to reports, you are referring to reports that you elected to meet, is that correct?

A. We are only referring to green sheets that became an authorization for IA's and where we met the competition, yes.

Q. If you would, please tell us what happened in 1969 and 1970?

A. Well, 1969 and 1970 were years of—I categorize as all-out competition and you can see the number of reports grew even while they had grown substantially from 1967 to 1968. They continued to grow in 1969. There were almost 6,500 involving National Gypsum Company, over 5,500 involving Georgia-Pacific Corporation, more than 2,500 [8946] involving Celotex. There was something in the range of 33 to 3,400 involving the four other multi-plant producers and slightly more than 1,000 just up a little, on the single-plant producers.

Q. Would you continue with 1970? What happened in 1970?

A. In 1970 it was still, as you can see——

Q. I am sorry. I misspoke.

1971.

A. Well, the continuation of what happened in 1969 is reflected in 1970 in the thousands of reports on each of the first three competitors, plus the four multi-plant competitors.

In 1971—now, during this period of time, of course, prices, our net price was going down. We were still in inflation. Our costs were going up. Market opportunity was at a fairly steady and not good rate. The housing starts were, all three of these years, reflected levels either under or slightly above a million five, which is a low level.

In 1971, for the first time since the United States Government started keeping the statistics back, I guess—I have seen pages of their statistics that go back to 1920's, but for the first time in 1971 the number of housing starts reported by the Federal Government [8947] exceeded two million. The best opportunity year we ever had.

Q. What happened to your prices in 1971?

A. In 1971 we were able to make a very slight reversal in our prices and we were not required to meet nearly as much competition as we had in the three previous years. Though you will notice, compared to the year 1967, 1971 was still a very competitive year.

Q. What happened in 1972 and 1973?

A. 1972 was a year of all-time-record housing starts and 1973 was the third consecutive year of housing starts exceeding two million. Both years of good market opportunity for us and also years of inflationary costs, rising costs.

The numbers of requests to meet competition are up slightly from 1971, but, you know, significantly lower than 1968 or '70 or '69. But still a lot of price competition in the market, even with good business compared to 1967.

[8948] By Mr. HIERING:

Q. When did Government price controls first come in?

A. The Government began its price control program in August, on August 15, 1971. And it continued through, therefore, all of 1972 and all of 1973.

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[8953] • • •

Mr. FRICANO. If Your Honor please, I don't know. I am sure it is inadvertent, or . . . but I would like very much to have clearer copies, if I could possibly have them. I am having grave difficulty in reading these.

The COURT. Aren't they showing you those charts before they are putting them up?

[8954] Mr. FRICANO. Oh, yes. But I can't carry that chart downstairs to my office.

Mr. HIERING. Your Honor, we did supply copies. They are rather poor, because ours were poor. They were the handwork that the artist used for his charts.

Mr. FRICANO. I didn't suggest that there was anybody at fault, Your Honor.

The COURT. If it is possible to give him clearer copies, do it.

Mr. FRICANO. Could they take a picture, perhaps?

Mr. HIERING. We will do the best we can.

Mr. DELONE. I have color-coded them. I will lend them to Mr. Fricano.

Mr. FRICANO. I need some help. I am glad to get it from wherever I can, Judge.

The COURT. I keep here available a Polaroid camera.

Mr. MCSWEENEY. How about a set of crayons?

Mr. FRICANO. If Mr. McSweeney wants to play with crayons, he may.

The COURT. All right.

• • • • •

[8956] Q. Mr. Galvin, before the lunch recess, I had asked you to describe USG Exhibit 303. Would you do that for us, please? That is the one that is on the easel.

A. Oh, 303A?

Q. Yes.

A. Yes. This is a summation for the seven-year period of the type of competition by competitor, in simple summation of the bars that you saw for the individual years, for each one of those competitors.

It indicates that the competitor most frequently mentioned in our reports was Georgia-Pacific, on a—more than 18,000 times, the next single competitor being National Gypsum, over 16,000—about 16,500 times, and Celotex Corporation was mentioned slightly more than 7,000 times.

The other two bars, as have been explained, are [8957] categories of multi-plant and single-plant manufacturers, the multi-plant about 11,000, and the single-plant about 4,000.

Q. Basically, is this Exhibit 303A a summary for all seven years of the same data that is on USG Exhibit 302?

A. It is the same categories for each of the years.

The COURT. Isn't it a fact all it shows is there were more inquiries about the bigger companies than there were about the smaller ones?

The WITNESS. Yes. It shows Georgia-Pacific was the one we met the most.

The COURT. That isn't a very startling conclusion, is it?

The WITNESS. They, of course, weren't the biggest competitors from number of plants.

The COURT. Aren't they?

The WITNESS. No. National Gypsum is the biggest from number of plants.

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[8965] • • •

The COURT. Why did you break it down this way? Why did you lump those two in the one column?

The WITNESS. I think just for simplicity in the chart, Your Honor.

Mr. FRICANO. Oh.

Mr. DELONE. I would ask Your Honor again to ask Mr. Fricano to restrain himself in his expressions and indications of what his evaluation is of the witness' comments.

The COURT. Go ahead. It hasn't been offered.

Mr. FRICANO. All right.

By Mr. FRICANO:

Q. The plain fact is that you didn't have to take five to 19 and get a bar like that, did you, sir? You could have taken, as you computed it, you did put it in a calculator—not a calculator—a computer; didn't you?

A. It is a run from a computer.

Q. And you had a computer print-out; didn't you?

A. Yes.

Q. And I am not an expert—perhaps you are—but somebody who knows how to do this thing can take the computer and hit the buttons and get four columns.

A. We had the four columns.

[8966–8990] • • • • •

[8991] Q. Could you tell us whathappened to prices in 1968?

A. In 1968 our overall price went down. It was on a decreasing trend. And in the year 1968 our overall price went down—for half-inch wallboard in the U. S. A. went down 71 cents from $40.77 to $40.03.

• • • • •

[8993] Q. Mr. Galvin, when you said that the realized price dropped from $40.77 in 1967 to $40.03 in 1968, a drop of 71 cents, would you explain for us what figure you are referring to when you use the term "realized price"? Exactly what is that?

A. Yes. I am referring to, on half-inch wallboard, the net price we received after shipment to the customer at the price we invoiced him, and the deduction from that of the freight which we pay, the outbound freight. So it is a true net price, not a—It is the sales revenue we [8994] actually receive to run our company with.

Q. And do you use that in the management of your company as a guide to what the actual price level is to the customer?

A. Yes, we use that. That is our guide as to what our price is, what our realized price is.

• • • • •

[8995] Q. Mr. Galvin, would you tell us what happened to prices in 1969, both published prices and actual prices in [8996] the marketplace?

A. With regard to published prices in the year 1969, we published two major price increases. One of them became effective May 1, 1969. The other one we published to become effective September 1, 1969. But, we had to postpone that to September 16 to meet competition. So the published price went up.

What happened to the realized price was that there was heavier and heavier discounting off the published price, and the actual realized price for half-inch board went down. And for other board products.

Mr. HIERING. Your Honor, may I ask him what that figure is, just to tie it in with his testimony?

• • • • •

[8997] The WITNESS: The actual decline was from the level of $40.03 in 1968 down to $36.02 in 1969, or a decline in actual realized price on our largest selling item, half-inch wallboard of $4.01.

• • • • •

Q. So, Mr. Galvin, despite the fact that there were two published price increases, increasing your published price, the actual price in the marketplace went down $4.01 in the year 1969; is that correct?

A. Yes.

Q. Now, would you tell us what happened to prices in 1970?

[8998] A. Well, with regard to published prices we had several major price moves in 1970. The first one was posted to be effective—In other words, we sent it to our customers and asked it to be effective on January 1, 1970. It was a price reduction in nearly all of our markets east of the Rockies. In fact, in all of our markets across the country.

And we were forced to postpone that price increase to the date of January 12, 1970, again to meet competition. That was a price decrease.

In the southwestern states, the six southwestern states—which is roughly Texas, Louisiana, Arkansas, Oklahoma, Kan-

sas and Missouri—and in our case, we eliminated a little bit of Kansas and added a few counties in the Illinois and St. Louis market. But in that area we published a price reduction to be effective on June 8, 1970, in which we reduced our price levels from—general levels of $37 to $42—and I am referring to half-inch wallboard here—down to a level of $36 to $32.

This was our move in response to a price change that was originally posted by Republic Gypsum Company in which they had published a price reduction.

The market was so competitive at that particular time, that even the lower prices of $32 to $36 wouldn't be effective in the market. So that on—effective July 22 [8999] we published even lower prices in this six-state area. In fact, prices as low as a posted price, published price of $25 in the pricing zone that encompassed Houston, Texas. And we guaranteed those prices against increase prior to September 21, 1970, at which time we tried to go back up to the level of $32 to $36. This is in what I am calling the six southwestern states area.

In the balance of the country east of the Rockies we published another price reduction to become effective August 3, 1970. And that price reduction was ultimately even modified downward further, and finally became effective August 10, 1970.

And just to give you an example, on the January 12 move here in Pittsburgh, we would have reduced our published price in the Pittsburgh market a total of $10.25.

Subsequent to August, and subsequent to the September move in the Southwest, and some independent moves and decreases west of the Rockies, we embarked upon a policy of publishing market price reductions.

Now I did not summarize them. I know I counted the proposals that are more than 100, in which we would take an individual market, a few counties, or perhaps a pricing zone, and we would—if we found a lower competitive price—we would publish it. The total result of that was another—by the end of the year—another substantial [9000] drop in the price of half-inch wallboard.

[9001] Q. Is this price competition that you are referring to in 1970, the meeting of it by USG—is that reflected in USG Exhibit 302A?

A. Some of it is reflected in 302A, the price reduction action, which amounted to discounts off our published price.

The other thing, that is not reflected there, is that we are cutting our published price. We cut it substantially in all markets, both in the January 12 and the August 10 move, plus the moves in the southwest.

Q. So you had both price cuts in your published price list and further reductions off your published prices; is that correct?

A. Yes, that is what we had.

Q. Now, would you continue on, Mr. Galvin, and tell us what happened in the year 1971?

A. In the year 1971, was something of a turn-around year for the industry. I said, for the first time, we had a good level of housing starts.

Q. Could I just interrupt you a minute, Mr. Galvin? I neglected to ask you one other question with regard to 1970. What was the net result, in terms of your realized prices, for 1970, as compared with 1969?

A. Well, our realized prices had dropped from the 1969 level of $36.02 down to $31.29.

[9002] Q. Or a drop of about $4.73, if that is what that comes to.

A. Well, yes. That would be about $4.73.

* * * * *

[9017] Q. Now, turning back to your testimony that you believe that you had made approximately ten verification calls to your competitors, let me ask you, did you also receive any verification calls from your competitors with respect to inquiries as to whether you had offered a lower price to particular customers?

A. Yes, I did.

Q. And on about how many occasions?

A. I don't recall how many occasions, but I would say certainly again not more than ten, probably less.

Q. And would the time period be the same with respect to when you received these calls as it was with respect to when you made the calls?

A. Yes. The last call would have been either [9018] sometime in 1968 or before that.

Q. So that all of these price verification calls, the ones that you made and the ones that you received, ten or so that you made and the ten or twenty that you received, occurred, then, in 1966, 1967 and possibly 1968, is that correct?

A. Yes.

Q. After the last call that you received or made in 1967 or 1968, have you had any contact or communication whatever with your competitors regarding prices or terms and conditions of sale?

A. No.

• • • • •

[9028] CROSS EXAMINATION

By Mr. FRICANO:

Q. Now, you have testified here on direct examination that your verification calls, your price discussions with competitors—which were ten one way and maybe ten the other way—certainly ended in 1968; is that your testimony?

A. 1968 or earlier.

Q. Or earlier. Did you not testify before Grand Jury in this courthouse on February 26, 1973, on Government Exhibit 5048, as follows to the following questions?

Mr. HIERING. Could we have a page, please?

Mr. FRICANO. 5654.

Question: Did you stop at some particular point, or what happened?

Answer: I don't recall when my last contact was. I do know that in—I believe it was February, 1969, I received a letter directing me to cease my verification of lower competitive prices with competitors, and I have had none since.

• • • • •

[9029] • • •

Mr. BARTLIT. I would ask you, Mr. Galvin, if you were asked these questions and gave these answers:

Question: Over what period of time, can you tell the Grand Jury, did you ascertain from your competitors from time to time job price [9030] protection matters?

Answer: Any matters that dealt with receiving reports and trying to confirm those reports with competitors would have taken place prior to February 1969.

Question: O.K. That is when Mr. Watt's letter came around?

Answer: That is when Mr. Watt's letter came. Actually I don't believe I had any contact even at that time.

Were you asked those questions, and did you give those answers, Mr. Galvin?

The WITNESS. I believe I did.

• • • • •

[9031] Q. What did this letter indicate to you from Mr. Watt in 1969? And, was that the letter that you referred to in the testimony which I just read to you from the Grand Jury, your Grand Jury testimony?

A. This is the letter you read to me from the Grand Jury testimony.

• • • • •

[9032] Q. And that testimony was that you received a letter directing you to cease; is that not correct?

A. Yes.

Q. Is there any difference between "stop" and "cease"?

A. No.

• • • • •

[9041] By Mr. FRICANO:

Q. Well, the piece of your Grand Jury testimony that I gave you, that I put before you, sir, said you were doing it for Robinson-Patman Act purposes, calling your competitors, is that right?

A. The—what document are you referring to, I guess?

[9042] Q. I read you your Grand Jury testimony and it was in your answer.

A. That would be referring to the memorandum of policy, which I don't think actually states the name Robinson-Patman, but deals with contact with competitors.

Q. The policy memorandum of Mr. Morgan doesn't have the words Robinson-Patman in it, does it?

A. No, it does not have those words.

Q. Now, we have here two forms with a lot of blocks. Could you not have put a block on those forms when you devised it to indicate the competitor whom you contacted and even, perhaps, the nature of the contact?

A. I couldn't. Those two forms were devised in 1968 and I had absolutely nothing to do with the design of those forms.

Q. Do you know who did design those forms?

A. No, I do not.

Q. Do you know whether the lawyers did?

A. I don't know that.

Q. Did you have those forms in front of you when you made your telephone calls?

A. I don't know.

Q. Did you testify on direct examination that one of the primary purposes—there are two purposes you testified to—one of the primary purposes for keeping this record, [9043] this written record, was to protect yourself under the Robinson-Patman Act?

A. One of the purposes is Robinson-Patman Act price discrimination.

Q. You said there were two and that was the primary purpose.

A. I said as far as I am concerned, my day-to-day running the business, my prime use of it was gathering a field intelligence so we can make better managerial decisions as to what to do with the competitor we are constantly encountering in the market.

Q. The second reason was the Robinson-Patman Act?

A. The second reason is Robinson-Patman Act.

Q. For the second reason, if that was to support your position under the Robinson-Patman Act, can you tell us now why that form doesn't provide a block——

Mr. BARTLIT. Objection, Your Honor, he said he didn't prepare the form.

Mr. FRICANO. I think it is a fair question, Judge.

By Mr. FRICANO:

Q. —why that form doesn't provide a block to acknowledge in writing contemporaneously a contact with a competitor?

Mr. BARTLIT. Your Honor, he is not a [9044] lawyer and he didn't prepare the form and I object to it for that reason.

The COURT. Did the fellow who prepared the form tell you why he didn't put such a block in there?

The WITNESS. I don't know who prepared the form.

By Mr. FRICANO:

Q. Did you, keeping your second reason in mind, ever record or request the form be revised again to provide a block so that you could have that record for Robinson-Patman Act purposes?

A. No, I did not.

Q. Did it ever occur to you to do it?

A. No, it did not.

• • • • •

[9045] Q. What types of discussions did you have with your competitors?

A. Referring to the phone calls, the specific issue would be to determine whether or not a report of competition, report of a competitive price action had already been taken and come to us from our sales force to determine whether or not we could seek additional information as to whether that report was true.

Q. Did you have such discussions on such things as a more favorable price than USG?

A. We asked questions about specific instances of more favorable prices than USG.

Q. And how about the second category, price discount or allowance?

A. I don't recall that. Wait a minute. Excuse me. The second category is just a—one sub-item under the total category that you talked about.

Q. Well, is it fair to state, then, with respect to each one of these competitive situations which you have chronicled, that they were the types of conversations that you had with your competitors?

A. No.

Q. Why not?

A. Because I didn't. I don't recall discussing all of those situations.

[9046] Q. Which ones do you recall, sir?

A. Well, only price protection, in that group.

Q. When you had your discussions on price protection—well, I'll withdraw that. When did you get most requests from the field on price protection?

A. I couldn't tell you specifically. It would be in the—usually, it would be when a price change either had just been made or was about to be made.

• • • • •

[9049] Q. Did you not testify before the Grand Jury, at page 6691, on October 1, 1973, the following question and answer, as follows:

> Now, then, would, then, requests for job price protection be more prevalent between the time that a price increase was announced and the time it was to become effective?
>
> ANSWER. The requests came at that time; yes.

• • • • •

Mr. FRICANO. I am sorry. "The requests [9050] come at that time; yes."

Mr. BARTLIT. Right.

By Mr. FRICANO:

Q. Was that your question, then—I am sorry. Was that the question that was asked, and did you give that answer, and is it true today?

A. I gave that answer; yes.

• • • • •

[9052] Q. Did you discuss with your competitors any other matters besides job price protection, sir?

A. I would have. I seem to remember either making or answering inquiries about specific matters, specific instances of rail delivery—excuse me, truck delivery, in a rail-only zone.

• • • • •

[9053] Q. Was there anyone else besides yourself engaged in the practice of exchanging prices with competitors while you were doing it?

[9054] A. I was aware that price verification contacts could have been made by Mr. Evans, Mr. Weiser, possibly Mr. Baldwin.

Q. Well, from time to time, you instructed Mr. Weiser to make some calls for you; did you not?

A. I asked Mr. Weiser to verify a specific information, specific instances for me.

Q. And did you ask Mr. Baldwin to do it, too?

A. I think I may have.

• • • • •

[9055] Q. How did you learn whom to call?

A. I believe I learned the names from Mr. Weiser.

Q. When was this?

A. I couldn't place it exactly. I am sure sometime subsequent to my assuming a position that had to do with wallboard pricing, so it would be 1966.

• • • • •

[9057] Q. Was this authority—I won't use the word "authority." Did you finally—was this what you did, exchanging prices, price protection and so forth, was this limited to a certain echelon of corporate officers?

A. From my personal knowledge, it would have been limited to myself. At least as far as the Central Division was concerned. Mr. Weiser and Mr. Evans.

• • • • •

[9059] Q. Now, whom did Mr. Weiser identify to you in competitor companies, sir, when you took the job?

A. I don't know if Mr. Weiser identified all of them. The people I knew, the people that I can recall that either called me or I called them, are Mr. Atwell and Mr. Kroth, National Gypsum. And, Mr. Sikes of Georgia-Pacific.

• • • • •

[9061] • • •

Q. Is it your testimony, now, that you don't—well, I will withdraw that.

Did you, when you received these telephone calls, did you respond honestly?

A. I would say I responded honestly.

Q. Did you do this so that you would be assured that, when you called your competitors, he would respond honestly?

A. I could have no assurance. I did it because it is my mode of doing things.

Q. After you stopped calling, did others still call you?

A. No, I don't remember the last incoming or outgoing call.

Q. Did you advise Mr. Atwell or Mr. Sikes or Mr. Kroft that you were no longer going to do it?

A. No.

Q. Was it in United States Gypsum's best interests to respond to these telephone calls?

A. In the instances that I would have responded, yes, [9062] it would have been in our best interest.

Q. Why, sir.

A. If the competitor had the right information, then it would certainly not—we had already extended the answer for good business reasons, and, if he had the wrong information, we would prevent him from becoming misinformed—or couldn't prevent him from it, but, at least, if he became misinformed, he was going to misinform himself.

Q. Did it have any other desirable effect for United States Gypsum?

A. I can't think of any.

Q. Did you not testify—page 5870 of your Grand Jury testimony, as follows——

* * * * *

Q. Did you not testify to the following questions?

> Mr. Galvin, how did it benefit United States Gypsum for you to respond to the incoming calls from your competitors?
>
> [9063] ANSWER. It could benefit us in—if the competitor had the correct information, and I failed to respond, he might react by lowering the price, and, at that point, I could get into some situations where I would—we have a price, he has a report, he lowers his price—I could wind up having to lower my price to meet him.

Was that question asked of you, and was that your answer, and is it true today?

A. Yes, that question was asked of me, and, yes, that was my answer.

Q. Is it true?

A. As a hypothetical situation, it could have happened that way.

Mr. FRICANO. May the witness have Government Exhibit 156, please?

* * * * *

[9064] Q. Is this first page in your handwriting?

A. Yes, it appears to be in my handwriting.

Q. Does this reflect the exchange of competitive information with Georgia-Pacific in 1966?

A. The file appears to be a 1966 file, involving a specific competitive situation.

Q. And did you not contact Georgia-Pacific with respect to this specific competitive situation, as you have labeled it?

A. Yes. It appears I may have contacted Georgia-Pacific.

Q. And is it not the fact, sir, that the specific competitive situation you are talking about involves customers located in a multi-state area?

A. It appears that it initially involves a report from one customer.

Q. It expanded, though, when you wrote your note, didn't it?

A. It appears I sought as much information as I could get about this particular situation, and that I got information on several states.

Q. Information on several states; and you also got an explanation on why it was occurring, didn't you?

A. Emergency authority is what it says.

[9065] Mr. FRICANO. With the permission of the Court, I would like to read this to the jury, Your Honor.

This is from J. P. Galvin, and the date in the document to which it is attached, the next document is dated April 8, 1966, and it—and it is in a file with a green sheet——

By Mr. FRICANO:

Q. Is that a green sheet up there? That is, isn't it?

A. That is a green sheet.

Q. It is in a file with a green sheet, and the note says, "W. B." Does that stand for Bestwall?

A. I would surmise it does.

> Q. Bestwall has given their Blue Rapids plant and Kansas City regional sales manager authority for emergency truck shipment of rail orders at the rail price. This due to rail car shortage and applies to accounts in Kansas, (all), Nebraska (all) and western Missouri (including Kansas City, Missouri.)

And then I can't read that word, because the stamp—it has been hand stamped over it. Can you read that, Mr. Galvin? Is it "Probable basis for this report"? Is that what it says?

A. It seems to be "probable."

Q. And are your initials at the bottom; are they not?

A. Those appear to be my initials.

[9066] Q. You describe this as a specific situation, sir?

A. It is a specific situation of emergency trucking.

• • • • •

[9070] Q. At the last sentence in the entire customer report, "There is no order involved at this time."

What were you verifying, if there was no order involved?

A. There is another routing slip on this that says we are getting—first the—first the—the competitor report is they are offering truck service in Kansas, an entire state, and the second thing, the district manager says, "We are getting too many reports from Bestwall for there not to be something in the wind," meaning they were doing it over a broad area.

Q. Did he request you to call anybody?

A. He didn't request me to call anybody.

Q. Then this was no verification for Robinson-Patman Act purposes, was it?

A. It could have been I had other requests for approval of price adjustments on meeting this very situation or wanted to get other requests to prove.

Q. Do you remember any, sir?

A. I don't remember any right now.

• • • • •

[9086] By Mr. FRICANO:

Q. Prior to the recess on Thursday, Mr. Galvin, you had just identified Government Exhibit 5050.

• • • • •

Q. Would you please redescribe this document for the jury?

[9087] A. This is a document that grants the 3 per cent additional cash discount for prompt payment to all dealers in Coffeyville, Kansas.

Q. Now this situation arose in 1967, did it not?

A. It is a 1967 file, yes.

Q. Now it consists of a number of different pages and I would like to start with you through this document, Mr. Galvin, from the rear, because it moves chronologically forward in that direction.

• • • • •

Q. If you will look at the handwritten note, which [9088] I think is the third page, you will notice the initials "D. M." appear at the bottom. Is that Don Meyer?

A. That would appear to be Don Meyer.

Q. All right.

And he is alerting a Mr. Long of the possibility of a 3 per cent discount being granted in this marketing area, is he not?

A. From a study of the file, that is not the interpretation I would put on it.

Q. Would you please interpret it then, sir?

A. O.K.

Mr. Long on, it appears to be July 12—on July 12 Mr. Long initiated the green sheet in which he reported that all competitors, as far as I can tell, are including the additional 3 per cent cash discount to Coffeyville, Kansas. Kansas Lumber told me National and Celotex offered them the additional 3 per cent. The Home Lumber Supply Company purchased a truckload from Dierks and received the additional 3 per cent.

Just July 12, and Mr. Long, who is reporting, is reporting to his district manager this 3 per cent is available to these dealers.

Q. By National, Celotex and possibly Dierks, is that correct?

A. Yes.

[9089] Q. That is the information that filtered on up.

As you proceed on down the file, through the file, we come to a routing slip which is to you, Mr. Galvin, and there is somebody's name or initials at the bottom and I cannot make it out. It is identified 113411, that page.

Do you have that, 113411?

A. Oh, 113411, yes, I have that.

Q. And it is a routing slip to you.

Can you identify who that is?

A. Well, the routing slip says—is printed from W. K. Palmer.

Q. All right, fine.

And he is asking you, is he not, in this slip, "Could you check it out? We may have a problem here."

How did he want you to check it out, Mr. Galvin?

A. Well, at this point in time, I don't know.

Q. This man is in the field, or he is not a headquarters where you are, correct?

A. He is an area sales manager.

Q. He is in the area where this is supposed to be happening, is that correct?

A. He is in the area and has a competitive report, correct.

Q. And he is asking you at headquarters to find out [9090] if it is true, is that right?

A. I—like I say, I don't recall the specific circumstances of this 1967 memorandum. I would, if I were to surmise, I would say what Mr. Palmer realized was that I had access to competitive reports that came in from all over the division and I think what he was telling me was would I check my file of our competitive reports and see if I have anything on competition extending the 3 per cent cash discount into our division.

Q. Did you do that? Did you check your file or call your competitors?

A. I don't recall if I checked my file. I know I didn't call my competitors.

[9091] Q. Now, you asked Mr. Baldwin to call; didn't you?

A. It appears that I sent a request to Mr. Weiser, initially, which wound up with Mr. Baldwin asking if he would look into that.

Q. And what did he do? Did he check the files or records of United States Gypsum Company, or did he call his competitors?

• • • • •

[9092] Q. To your own knowledge.

A. To my own knowledge, I have here copies of slips, but—which wouldn't indicate to me I was with Mr. Baldwin when he did anything, but all I have is what is on records.

Q. All right, sir. Did he send you a buckslip that said, "From J. L. Baldwin to J. Galvin," and did he say, "National—no; Celotex—unavailable, at association meeting all this week"? Did he send you that buckslip?

A. Yes. There is such a buckslip in this file.

Q. Did Mr. Baldwin call National?

A. The buckslip would indicate he did.

Q. And the buckslip would also indicate he called Celotex; but, whoever he called at Celotex was at a Gypsum Association meeting; is it not?

A. An association meeting. I don't know what association.

• • • • •

[9093] Q. Now, at the bottom of this page, there is a handwritten note, and that is in your handwriting; is it not?

A. It appears to be in my handwriting.

Q. I can't read it from my copy. It is obliterated. Can you?

A. I am not sure I am exactly correct, but it seems to say, "No big rush. Would you please check Tampa on Monday?"

Q. Where is the headquarters of Celotex?

A. In Tampa.

Q. Were you asking Mr. Baldwin to check at Tampa with Celotex?

A. I would put that connotation on it.

Q. And then what is the next page? The next page is a buckslip from Mr. Baldwin back to you, Mr. Galvin, and it states, "Celotex—no;" does it not?

A. Yes, it does.

Q. Is that the report Mr. Baldwin gave to you after he checked Tampa?

A. It appears to be.

Q. In this situation, you contacted your competitors, and both of your competitors denied granting the three percent discount in this market area; did they not?

Mr. Heiring: I object to that. It is a [9096] mischaracterization of the witness' testimony.

The Court. If it is, he will say so. I asked you, before, not to stand up and indicate what an answer should be.

By Mr. Fricano.

Q. Both—based upon the file, as it appears here, both the competitors, Celotex and National, said, "No, we are not giving a 3 percent discount in this marketing area;" isn't that correct?

A. Mr. Baldwin's note would indicate they may have given that answer to him, if they did give it to him.

Q. In such situations, have you not testified, if you confirmed with your competitors that they are not doing it, you do not?

A. No, I have not testified to that. What I said is we would go back to the field for additional evidence, and, if we still felt there was a reason to do it, we would either approve or disapprove the file, but we would need something more than existed at the time.

Q. Is it your testimony, sir, that, when you contacted your competitors, they weren't the last word with respect to that situation?

A. With respect to this situation, from my knowledge of this file, I know they were not.

Q. So you didn't accept their word, did you?

[9097] A. I don't know whether we accepted their word, but we obviously went back to the field for further information.

Q. Why did you bother to call them in the first place? Why didn't you use your field people down there and your market people down there? Why bother with them in the first place?

A. I think, in the first place, we were non-competitive. We may have been losing business, and I didn't have final authority to sign this, and I was trying to get complete evidence so we could go ahead and proceed immediately.

Q. Then, the plain fact is, after the competitors were contacted, the denials were made, you went ahead, in any event, and recommended to your superiors that this discount be granted, and it was, in fact, granted; isn't that true?

A. The—on the 19th, three days later, and, apparently, after two consultations with our sales force——

Q. Do you know you had consultations?

The Court. Don't——

Mr. Fricano. He said "apparently."

The Court. Don't interrupt in the middle of an answer.

The Witness. I don't know, in this specific time period, from the 16th to 19th. I obviously was in contact with the districts the whole time. What I did was write a proposal, later, on that, and I said, in [9098] this—particularly the third paragraph, I said—I told what business was at stake. It wasn't a big market, but I said, "USG is the prime supplier to both of these dealers. One or more of the competitors could quite possibly secure the situation, either by an exception to their normal terms," which apparently they didn't have, "or consignment of an Oklahoma destination and subsequent diversion of the

shipments. In the latter instance, we would lose the business, even though the competitor technically had no exceptions to his proposed terms policy." As I became more familiar with where this market was—Coffeyville, Kansas was not one of the places that stuck in my mind as any place I had ever been. When I became aware of where this was, I realized the town of South Coffeyville, Oklahoma, and the town of Coffeyville, Kansas, are not far apart. There is a distance of just a very few miles, and what I was saying is I thought we should go ahead and grant this exception to everybody because, despite what stated policy was, I think the mechanism in the market is working in such a way that we are going to lose business if we do not.

[9099] By Mr. Fricano:

Q. Did you call your competitors to find out whether or not they were in fact doing something which would warrant you taking the action which you took?

A. Warrant me taking it, which I undertook? I don't understand.

Q. Warrant your recommendation, your analysis.

A. There would be—since this particular recommendation is to grant the exception to everybody—there can be no discrimination. There can be no Robinson-Patman aspect of it once you grant it to everybody.

Q. But in granting . . .

A. And that was my recommendation.

Q. But in granting it though, you didn't want to do it unless you had to; did you?

A. I don't know what my thoughts were at this particular point in time.

Q. Well, you just read through the documents which you wrote, and you seem to be able to articulate your thoughts, sir. At least I thought you did.

A. On the 19th of October I very definitely wanted to grant that exception to everyone in the market.

Q. Well, that's because you thought you might lose the business?

A. Because I thought we might lose business.

[9100] Q. But if in fact, sir, your competitors were not doing something that would force you to grant the 3%, you didn't want to do it; did you?

A. I don't recall that. I could have been for this from the beginning and only the corporate group would have been against it, but I have no specific recall of that at this time.

Q. In any event though, is it fair to say that based upon this file your competition said they were not granting the 3%, but ultimately your recommendation was to grant the 3% to everyone in Coffeyville?

A. To everyone in the Coffeyville, Kansas, market.

• • • • •

[9102] Q. That document is now in evidence and it has been marked 5051. This is another competitive price report; is it not?

A. Yes. It is a price adjustment.

Q. Now, this is one that you got involved in; is it not?

A. I signed this price adjustment.

Q. It has your handwriting on various buckslip notes throughout the file; does it not?

A. I see two notes with my handwriting on.

Q. Now go to the last page, if you would, the telegram. What is the date of that telegram?

[9103] A. It looks like 23 December.

Q. That's right.

And the year, from the other information, would be 1966; would it not?

A. There is no way to tell from the telegram.

Q. Well, I mean from the other, from the rest of the file.

A. I am not sure there is any way to tell from the other file.

Q. All right, sir.

A. It just has a date behind it. It just has 23 December.

Q. December 23. That's No. 1.

Now, on that date you authorized a price of $195.50 per thousand of fire code vinyl sheet rock to a customer; did you not?

A. I said I would approve a price of $195.50 on 35,000 feet.

Q. Did you ascertain, prior to the time that you made that approval, what your competitor, Georgia-Pacific, was doing with respect to this customer?

A. This is a very confusing file. But, from looking at it I couldn't tell one way or the other whether I ascertained on this specific customer.

Q. Turn to the third page from the bottom, if you [9104] would. Do you have that?

A. Yes, sir.

Q. Does that say in your handwriting, "Per phone —". And what is the next word?

A. "This." I think it is "this."

Q. "Per phone, this is Sikes' bulletin price per his formula." Who was Mr. Sikes?

A. My surmise would be it is Mr. Sikes at Bestwall.

Q. What is the date of that buckslip?

A. It is dated January 9.

Q. The year before or the year after?

A. I don't know. It is just dated January 9. And there is no identifying stamps on it at all.

Q. What do you mean, "Per Sikes bulletin price per his formula."

A. At this point, I don't know.

Q. Well, let's turn the page. Is that not another note handwritten by you, Galvin, to Mr. Weiser reflecting your conversation with Mr. Sikes and laying out in a detailed fashion the prices which Georgia-Pacific was charging for that same project and showing the formula?

A. It apparently shows a method by which Mr. Sikes or Bestwall arrived at a pricing on a non-standard special item.

Q. What is the date of that?

[9105] A. It has again got January 12, with no reference to what year it was.

[9106] By Mr. FRICANO:

Q. On the bottom of the page you have your formula laid out, do you not?

A. I have our practice and I say, "Not published to the trade."

This was a special that didn't occur all that often, but we had a practice for pricing them.

Q. And Georgia-Pacific wasn't published to the trade, either, was it?

A. I don't know whether they did or not. If they did, I—I don't recall ever seeing it.

Q. You wouldn't have called Mr. Sikes, if you could have gotten your field people to pick it up from the trade?

A. They could only pick up the price they're charging. They cannot pick up——

Q. The formula?

So you called Mr. Sikes and made the approval on December 23 and then there is a note that shows his name, per his formula on January 9, and then on January 12 there is another handwritten note by you laying out not only his formula, but your formula, is that not correct?

A. Laying out our practice, yes.

Q. And it states to Mr. Weiser your formula should be corrected to their formula, does it not?

A. No. I think that particular reference refers back [9107] to an undated memo by Mr. Weiser that says the P/A was badly written up and it doesn't cover the right product, because further up in the P/A, which had been typed up, it says half-inch Sheetrock fire code vinyl and I have written five-eighths inch Sheetrock fire code vinyl. That is what Mr. Weiser is referring to, and that is what in my opinion it refers to.

Mr. FRICANO. If Your Honor please, because there is some question in the witness's mind whether or not the dates in the upper right-hand corner of the buckslip note cannot be ascertained from the integrity of the document itself, I respectfully request that the jury be permitted to examine the document to see if they can make the determination.

The COURT. They will be allowed to examine it at the recess.

By Mr. FRICANO:

Q. I am correct in the way I have summarized your testimony? You say you can't tell this date right here is 1966 and that that these dates are 1967, from this?

A. There is nothing on this document that indicates the year. It is just a date.

Q. I understand there is nothing on the buckslip, nothing you have written there that indicates the year, but you can tell from this file, the integral file that was [9108] produced to us like this, what these dates are?

A. Not exactly.

Q. All right, sir.

Mr. FRICANO. If I can have the jury at the recess look at these, look at this one.

By Mr. FRICANO:

Q. Why did you authorize the lower price and then subsequent to the authorization find out from Mr. Sikes what his unpublished internal formula was?

A. I don't put that interpretation on this at all, Mr. Fricano.

Even giving you the dates being correct, there is nothing in my memo or in my buckslip to Mr. Weiser on January 9 that this had not come up before and that on some other previous date to any of these dates, I have determined this, and I was just telling Mr. Weiser this is a very believable report.

Q. Don't you try to keep your information together in one folder or one file that relates to a customer or a particular situation?

A. These P/A's are kept together in one P/A at a time, and there could have been a previous P/A to this. I have no way of knowing that at this point in time.

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[9276] WALLACE R. WEIDMAN

DIRECT EXAMINATION

By Mr. KECK:

Q. Please state your name.

A. Wallace R. Weidman.

• • • • •

Q. By whom are you employed?

A. United States Gypsum Company.

Q. In what capacity?

A. I am group vice president of our construction products group.

• • • • •

[9282] Q. I would like to refer to September of 1967, when you became general manager of the central products division, and ask you to describe the competitive conditions, beginning in that fall, that you can recall in your line capacity.

A. Well, we were beginning to get some competitive price action on gypsum board, and it was beginning to be widespread. We were taking very little action to meet this competition in some isolated cases, but we were steadily losing market position, and this was generally the condition I found at the time I moved into the division.

[9283] By Mr. KECK:

Q. What happened thereafter as you continued in the division into 1968?

A. Well, the intensity of the competition continued to grow, and it became more and more accelerated as we went along. And it wasn't very long until it developed into a full-fledged price war.

Q. And do you recall the identity of the companies that you seemed to come in contact with the most in this coming budding price war?

A. Well, without question Georgia-Pacific was the most aggressive. And we encountered them on more occasions than anyone else.

National was quite active. Celotex. Flintkote. All were beginning to be extremely active.

But I repeat, Georgia-Pacific was by far the most aggressive.

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[9296] Q. There has been testimony here about a Mr. Pappert and a Mr. Galvin being invited to visit with Mr. Duffy in December, 1967, with respect to the condition of market [9297] share of your company.

A. Yes, sir.

Q. Do you have any personal recollection with respect to that period of time and that visit?

A. Yes, sir. Yes, sir, I do.

As a matter of fact, Mr. Pappert and Mr. Galvin were invited to Mr. Duffy's office without me, because I happened to be away on a trip at the time. I received a special invitation after I returned from the trip.

• • • • •

The WITNESS. When I returned Mr. Duffy had left word that he wanted to see me, and he repeated what he had said to Mr. Galvin and Mr. Pappert, and made it very clear to me that my mission was to get busy and get our [9298] business back and to get ourselves in a competitive position so that we could get our business back.

Our industry share had dropped to an all-time low by October of that year, and we had just received those figures in December.

Q. Do you recall what you did thereafter, after that visit with Mr. Duffy?

A. Yes, sir. I had a meeting with Mr. Pappert and Mr. Galvin, and we set in motion by directing, by the direction of Mr. Pappert to his sales managers, to immediately take an aggressive position to meet the competition that we were encountering in the market, that up to that time we had not been meeting on an all-out basis.

Q. And can you date when this change of strategy occurred?

A. Well, to the best of my recollection these meetings took place in the middle of December, and we implemented this program almost immediately. And so that by the first of the year of 1968, which was just a couple of weeks later, the program was in full swing.

Q. Can you describe your recollection of conditions, competitive conditions in the Central Division, during 1968?

• • • • •

[9299] The Witness: Yes, sir. There was competitive activity, rather brisk competitive activity on the part of all of our competitors with Georgia-Pacific in the most aggressive posture.

National Gypsum, Celotex—or Jim Walters, if you will—Flintkote Company, Kaiser, all very active in rapidly meeting competitive conditions that they were encountering with great frequency.

And so that our activity in this regard was considerably accelerated in 1968, as is pointed out by the figures shown on that chart or by the bars shown on this chart for 1968.

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[9303] Q. And you have described 1968. Now, my question has to do with '69, the competitive conditions in 1969. Do you recall them?

A. Well, as the chart shows, the competitive activity accelerated tremendously.

At that time there is no way to describe it other than an all-out price war, and every manufacturer in the industry was deeply involved in it, and on a continuing [9304] acceleratir.g basis, all through 1969.

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Q. Yesterday, Mr. Galvin introduced an exhibit known as U.S. Gypsum Exhibit 319, which purported to show over this entire period the competition by competitors.

This is for the years 1967 to '73, and it shows quite a disparity between certain ones and certain others.

Do you recall the testimony?

A. Yes, sir.

Q. Now, do you recall, from your line experience, the relative times that you met these various competitors of yours in the field?

A. Well, I think the chart shows that clearly.

Georgia-Pacific was, by all odds, the most aggressive competitor in the field.

National Gypsum Company was very active as well.

Celotex, Flintkote, all were extremely active, but Georgia-Pacific, with their over 100 warehouse distribution centers, which had the net effect of giving them over a hundred plant locations from which to operate, really gave us a hard time. They made it very, very rough.

Q. When did that start in the years we have been talking about?

A. Well, when I assumed my position as general [9305] manager of the Central Division, Georgia-Pacific was already leading the way from the standpoint of creating lower prices.

Q. This exhibit, USG 319, shows the number of times P/A's were granted that referred to what are known in this record as one-plant producers.

A. Yes, sir.

Q. And the number of times is very small compared to the number of times of some of these other gypsum board producers.

Does your experience confirm the statistical approach that Mr. Galvin used yesterday?

A. Oh, yes, very definitely. I think there is one obvious explanation for it.

You labeled them "single plant producers," and Dierks, for example, which I believe is one that's on there, Dierks, with one plant located in Arkansas, had a very limited area in which they shipped or sold their product normally, and that's the only area that we encountered those people. And, consequently, that's the only area in which they would show up on a green sheet or P/A; contrast National Gypsum Company, for example, with, I believe, about 18 plants around the country, and Georgia-Pacific, with a somewhat lesser number, but, nevertheless, it isn't surprising at all that Georgia-Pacific, National and the multi-plant producers would show up with much [9306] greater frequency on our overall green sheets.

Q. And price adjustments?

A. And price adjustments, that's correct.

Q. Would the same be true with respect to Texas Gypsum Company?

A. Very definitely would be. Texas Gypsum Company was located in Irving, Texas, I believe it is, and their total sphere of influence, until they sometime later opened a plant in Memphis, was almost totally in Texas.

Q. And Republic Gypsum Company?

A. Republic, the same way. Republic was apparent primarily in Oklahoma and Texas. They got into some other areas, but that's where we encountered them most frequently, and, of course, the overall frequency, you must understand, couldn't begin to compare with what we would encounter with Georgia-Pacific or National Gypsum Company.

Q. Then, does your experience indicate that the statistical numbers that the Galvin exhibit show reflect the competitive conditions during the period of years which he covered?

A. Yes, I think it reflects it very well.

Q. In your own personal experience?

A. In my own personal experience.

I had the job of extracting the sales for our company out of this area.

[9307] Q. Now, we were talking about 1969 and the very large volume of P/A's that developed.

A. Yes, sir.

Q. As compared to the year '68. Can you tell us why there is a disparity between these years, a greater volume, a substantially greater volume in 1969?

A. Well, as I have stated, the intensity of the situation increased, the housing starts dropped rapidly. The business, the volume potential, was much lower in 1969, and every competitor was scrambling very hard to keep their own plants running.

This was a condition that was a little different than 1968, but, in addition to that, I must refer, again, to Georgia-Pacific, with

over 100 distribution centers, and also to the fact that the gypsum part of Georgia-Pacific's business being a comparatively small percentage of their total business, most of their products being plywood or lumber products, that they were, I think, much more ready to deviate from a list price on gypsum products, because when they shipped a total load of materials to their dealer customers, the gypsum was a rather insignificant part of that total package.

So we found them very extremely aggressive, and along with that, our best intelligence told us that they were operating their plants, even in a year where the [9308] business opportunity was down substantially, they were operating their plants at almost a full-out level.

As a matter of fact, our intelligence said that they were operating all out. They shipped the material to the warehouses, and it was the warehouse managers' or the distribution center managers' job to dispose of that material. I suppose if he didn't dispose of it, he would eventually be covered up with it.

Q. Did the Georgia-Pacific branch managers, in your experience, all react exactly the same way or did they react in differing ways?

A. They reacted in different ways, but I would say that they had a very common aggressiveness.

Q. I would like to focus now on the year 1970 and call your attention to the fact that U. S. Gypsum Exhibit 302 would indicate that there were somewhat more P/A's in 1970 than 1969.

A. Yes, sir.

Q. And ask you if you can tell us why that is true?

A. Yes, sir.

Q. Was true?

A. I think I can do that. We, I think—I think everyone here, by this time, is familiar with our method of meeting competition, the green sheet-P/A route, and that's what this displays, the extent to which we did that.

[9309] We found that that was a rather cumbersome and tedious procedure for the type of competitive condition in the price war situation that we found ourselves involved in, and, so, we arrived at two or three ways to offset that; one of them being that we would lower a level of price, once three or four

situations arose which seemed to indicate that the price was going to be a common thing. It was going to be a rapidly spreading situation.

We had had a lot of experience on that in the background, and, so, rather than issue a whole string of green sheets and P/A's, we would make the decision, rather the general manager in the division would make the decision to issue a price reduction announcement, covering the total area.

Now, we would determine this area to a great extent by the location of Georgia-Pacific warehouses and the influential area involved with that warehouse, in other words, their economical area of operations, and we had, by that time, become quite familiar with that.

[9310] By Mr. Keck:

Q. What was the economic area of operations of a Georgia-Pacific distribution center?

A. That would vary by the location of the center. If you are talking about a Georgia-Pacific center in Connecticut, for example, it would be short mileage, because of the density of population and activity. It might be 50 miles. That is just a probable figure.

Q. In another area——

A. If you took New Mexico or Oklahoma, the center of operation would be much broader, for the reason it took a certain volume of business to support one of these operations, and that goes hand in hand with where the population activity is.

Q. These centers, were they selling just in the area they were located in or did they reach out in the country area?

A. They reached out into the country area. They covered the market pretty thoroughly.

Q. Please discuss the area pricing you started to discuss.

A. The divisions were instructed that first of all, to do some rezoning around these distribution centers, and—which, in itself, resulted in additional zones and gave us more localized flexibility.

[9311] In other words, we had a smaller area in which we could take action and that did give us a greater flexibility in our action.

Q. How frequently could you take action in that type of situation?

A. I will try to describe to you a typical situation.

First of all, we told our people, "Look, get on the telephone and tell us what has happened as long as you can back it up with a green sheet. And then when you have told us that, we have this in in Town A, Town B, Town C, tell us you are ready to level. At that point, we will issue—first of all, we will give you telephone approval to lower the price, reduce the price in that particular zone or area immediately.

"You, in turn, can get on the phone to your customers. This is to all customers, not just to selected customers, all customers in that zone area. Simultaneously, we will release a letter to our trade in that area, which confirms this activity."

This was our method of responding to this situation.

That is the way we changed.

That, of course, would ont require a P/A. It might require—well, in fact, it wouldn't require any, because with the three green sheets we will say in three situations we would reduce the level to all customers in that particular [9312] zone, and that requires no P/A.

It might be 50 customers, so that would, in effect, result in 50 less P/A's being figured into this particular display.

Q. In your——

A. Does that explain it, sir?

Q. Yes.

In your decision to go to this new kind of an approach, did you have in mind trying to get out from under a very substantial load of P/A's?

A. I certainly did, because all of our people were swimming in paper. We had so much paper, if we had not done something, we would have been totally drowned in it.

You have seen some of it in this courtroom.

The COURT. I was going to say you just moved it from there, here.

By Mr. KECK:

Q. Did this changed technique occur in 1970, or when?

A. It occurred in 1970. We began this activity on a rather broad basis, as I recall, in about July of 1970.

Q. What was this called in the company, this strategy?

A. We didn't start out naming it anything, but it very quickly acquired the name the G-P War Zone Program. In other words, we declared war.

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[9313] • • •

By Mr. KECK:

Q. Who in the company was primarily responsible for the development of this marketing strategy that you have described?

A. I was, Mr. Keck.

Q. And who worked with you in implementing it?

A. All of the general managers and their staff in the division, and the sales organization.

Q. How long did this strategy go on in 1970?

A. This strategy went on through the balance of 1970.

[9316] Q. Have you prepared or caused to be prepared a map of the United States that would reflect the essence of the strategy which you have described as the G-P War Zone Strategy?

A. Yes, sir, I have had my assistants prepare such a chart.

[9317] Q. And would you tell us what that chart shows, in general description?

A. First, it is a division of the regional areas, as you have seen on previous maps in the courtroom.

Q. The division lines?

A. The division lines for the four U. S. A. divisions. It also includes a summary of the number of Georgia-Pacific distribution centers in each division.

In addition to that, it shows the number of price changes in, I believe, January of 1970, and I believe July, August, and September of 1970, and it also shows the range of list prices existing in a division during that period of time, and there are each of those areas.

Q. For what kind of gypsum wallboard?

A. For half-inch gypsum wallboard.

Q. And were these changes that you just described those that are shown by analysis of Exhibits 502 through 505?

A. Yes, sir, they are.

Mr. KECK. I offer in evidence USG Exhibit 501.

Mr. THORSON. No objection, Your Honor.

The COURT. It is admitted.

[USG Exhibit No. 501 for identification was received in evidence.]

[9318] By Mr. KECK:

Q. Mr. Weidman, let's start with the eastern division. It states up here 19 G-P distribution centers.

A. Yes, sir. Those are 19 G-P distribution centers handling gypsum wallboard.

Q. That were located in this northeastern part of the United States?

A. That is correct.

Q. And where were they located, the 19 located, in relation to large cities?

A. Well, almost all of them were located in large metropolitan areas.

Q. Now, is the eastern division—you have testified that this strategy of yours was in effect during the summer and on into 1970. This map shows that—does this information that I am pointing to refer to the eastern division?

A. Yes, sir; it does.

Q. Now, it says, "USG published price, half-inch gypsum board, January, 1970, changes, 8."

A. Right.

Q. "High, $57; low, $42. What does that mean?

A. Well, that means that, in the various zones in the eastern division, the prices ranged between those two figures. We have a zone, some place there, with the high figure, and a zone with the low figure.

[9319] Q. Then it says, "August, 1970, changes, 18; high, $48 low, $31." What does that mean?

A. That means that, during the month of August, we made, in various zones, 18 changes, 18 price changes.

Q. By price list?

A. By price list, by issuing a price list for the particular zone area.

Q. And those were areas around Georgia-Pacific warehouses?

A. Yes, sir.

Q. This was not done by P/A, then?

A. It was not done by P/A; no, sir.

Q. Now, let's go to the central division. It says, "26 G–P distribution centers."

A. Yes, sir.

Q. What does that mean?

A. That means that there were 26 Georgia-Pacific distribution centers located in the central division that handle gypsum wallboard.

Q. And where were they located within that central division?

A. They were in the metropolitan areas. If they were in—for example, ones in Oklahoma, were in Oklahoma City and Tulsa.

Q. Now, it says, below that, "USG published price, [9320] half-inch gypsum board, January, 1970, 14 changes; high, $57; low, $37."

A. Yes, sir.

Q. What does that refer to?

A. Well, that refers, again, to the fact that we made 14 changes of one kind or another, and, during that month, those zone prices varied from $57 to $37.

Q. Now, those changes are price—list price changes?

A. Those are list price changes, not involving a P/A. It did not require a P/A.

Q. Now, you have a number of changes in July, August, and September, six changes in July, ranging from a high of $42 to a low of $26.

A. Yes, sir.

Q. August, 1970, 33 changes, ranging from a high of $50 to $26.

A. Yes, sir.

Q. September, 1970, five changes, ranging from a high of $36 to $32.

A. Correct.

Q. Those are all prices reflected on these price lists?

A. That's right, none of them requiring P/A's.

Q. Am I correctly understanding this, then, that, in July through August, there were 44 list price changes in the central division, in areas around G-P warehouses?

[9321] A. That is correct. The war was on.

Q. Let's go to the southern division. It says here, "33 G-P distribution centers."

A. Yes, sir.

Q. Does that mean there were 33 in the southern division?

A. It does.

Q. That handle gypsum wallboard?

A. Yes, sir.

Q. It indicates U.S. Gypsum published price, in January, 8 changes, ranging from a high of $55 to $37.

A. Yes, sir.

Q. Now, those were list price changes in January?

A. List price changes in January, requiring no P/A's.

Q. And this was before your strategy changes that you have described?

A. Yes.

Q. In July, '70, it indicates 11 changes from a high of $32 to a low of $25.

A. Yes, sir.

Q. In August, 1970, from a high of $52 to a low of $34.

A. Yes, sir.

Q. September, 10 changes, from a high of $36 to a [9322] low of $32.

A. That is correct.

Q. Now, those are prices reflected on the price list?

A. All reflected in the price lists, not requiring P/A's.

Q. 33 changes, then, July through September, in the—list price changes in the southern division.

A. Yes, sir.

Q. "Western division, 24 G. P. centers." Does it mean there were 24 within the western states?

A. There are 24 within the western states.

Q. Indicating six list price changes, in January, 1970, from a high of $50 to a low of $35.

A. Yes, sir.

Q. And four changes, July, 1970, from a high of $42.50 to $35.

A. Yes, sir.

Q. Why would there be so few changes in July, in the western division, four of them, as contrasted with 44 here and 33 in the southern division?

A. Well, the competitive situation involving Georgia-Pacific warehouses was not nearly so bad out there, because they shipped their board from Sigurd, Utah and Acme, Texas, I believe it is, which is an awful lot of freight, into the metropolitan areas, where both of these warehouses are [9323] located, and my judgment would be that, although I know that they are not nearly as much of a competitive factor for us in our western

division area as they are in the other divisions in the country, and that is my analysis of what the reason is.

Q. Now, looking at the highest and lowest during the July through September period, I notice a high as high as $50, $52, and a low as low as $25 and $26.

A. Yes, sir.

Q. Were these prices reactive to competitive prices which you had found in the market?

A. Yes, sir, they certainly were. That is how it all came about.

Q. Now, each of these prices was a price change in a price zone?

A. That is correct.

Q. Did this mean that there were new and different zones created during that period?

A. Yes, sir. We created some new zones to fit our zones more nearly to the strategy that we had adopted.

Q. Was that strategy solely for meeting Georgia-Pacific competition?

A. No, sir. We applied it to National Gypsum Company or any gypsum competitor that was responsible for spreading or the beginning of the spread of a new low level [9324] of price. We did not discriminate in that regard because we were competing with them just as well.

Q. This was going on in all four divisions, but to a lesser extent in the western division?

A. That's right.

Q. Now, where were these 25 and 26 dollar list prices applicable, if you know, by way of geography?

A. Well, I think I do know. That is sort of indelibly etched in my mind. The $26 was in Oklahoma, Oklahoma City, and the $25 was in Houston, Texas, and I remember these so well because these were the lowest price levels in all of my time with the United States Gypsum Company. These are the lowest levels I had ever seen.

* * * * *

[9337] Q. Now, I notice that that price has recovered slightly. Can you now tell us what happened in 1971?

A. Yes, sir. By the late fall of 1970, there were factors that begin to change in the economics of the construction industry.

A. Yes, it did. Once again, this was a move, I would guess, or I would say that was—came about more as a result of the G-P competition and their marketing of gypsum wallboard through distribution centers as much as anything, plus there were numerous instances occurring around the country of competitors going on direct sale to gypsum wallboard applicators.

In other words, much of the policy of selling strictly through building material dealers began to be abandoned by a number of competitors, and that chain of distributions being the only one began to break down, so we began to think we should do something to protect our position with the drywall applicator.

In other words, we had had good relations with drywall applicators through our job work with them. In other words, through our promotion with them on their jobs, the technical aspects of the business that we were well founded [9340] in, and our relationship with them through our dealer establishment. We could no longer protect that by attempting to continue to do business through the drywall specialty dealers that were also selling these people. So we conceived the idea of going into our own drywall applicator distribution business, and that was the way the L and W Supply Corporation was conceived, and that is what it was conceived to protect; at the same time, it was another method of competing successfully with Georgia-Pacific on a direct basis for the applicator business.

Q. There has been some comment here that there is no way of knowing whether any of the thousands of P/A's ever resulted in sales. Do you have any information or knowledge about that?

A. Yes, I certainly do have some information and knowledge about that.

First of all, all of this work that is piled up at the back of the room, here, which represents the scope of the paper work involved in green sheets and P/A's, would never have been conducted under my management as an exercise that did not produce any business. I would say that at least 95 percent of those documents, those P/A's were—came about in order to produce orders for us.

Now, let me say a little more about that.

Q. About to produce orders or resulted in orders?

For example, the prime interest rate began to drop and the savings began to—the money flow began to go back into the savings and loans, which meant that there was going to be mortgage money at some future date available. There had been very little mortgage money.

At the same time, the housing starts that were beginning to be reported for November and December were beginning to rise, and it was quite apparent, and we were so advised by our marketing research people, that we were going to have an upturn in housing.

This is not an unusual flow of the opportunity curve in the housing industry. It is a business of large peaks and valleys, and we were coming out of the bottom of the situation, and getting ready to head into the upturn.

The predictions were that the upturn would be substantial and might even be dramatic.

Q. Now, before we get into the details of the upturn, it was a sharp upturn, as I understand it.

A. Yes, sir.

Q. Now, one last question with respect to these years. [9338] What were the various ways in which your company, in reacting to your competitors, reduced its prices during this price war?

A. Well, you have all, once again, been very familiar with the green sheet-P/A route. That was one way, and for many years was the predominant way.

Also, we began to reduce the—or put the actual price of the specific transaction on the invoice, even though it might not be a—it wouldn't show the list price that was in effect at the time, but it would show the actual price at which the particular order was sold at, and, then, of course, we used the leveling technique to the new lower levels that I described in the G-P war zone problem.

[9339] Q. So there are, typically, three ways?

A. There were three ways; that is correct.

Q. You have testified that you had responsibilities for, among other things, the L and W Supply Corporation?

A. Yes, sir.

Q. Did the L and W Supply Corporation, or its evolution; and its implementation have anything to do with the competition you discussed, in the years 1967 through 1970?

[9341] A. Resulted in orders. As a matter of fact, a great deal of the paper work happened after the fact, after the order had been secured, because, as I previously pointed out, we were under a very heavy fast-moving competitive attack, and our old method of starting one of these pieces of paper with a sales man and having it wind up, two weeks later, with someone in Chicago just wouldn't work any more. So we did a lot of approval by telephone and processed the paper work afterwards, to make the record, so most of the P/A's you see there did result in orders.

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[9354] Q. Now, referring to the times when you were Group Vice-President in charge of Operations for the entire company of construction products, and then you headed the largest of the divisions from sometime in 1967, I notice that your company's realized half-inch wallboard price in 1967, when you first assumed responsibility as general manager, that year was $40.77.

A. Yes, sir.

Q. And that it reached a low, as you have testified to, in 1970 of $31.29, or $9.48 less. And that thereafter it recovered in part, but that at the end the difference between the $40.77 and the $35.79 is still approximately a [9355] $5 difference, $5 less than you start?

A. That's correct.

Q. Do you know any other building materials that have fallen off over 10 percent in the period 1967 to 1973?

A. I don't know of any other building material. It is certainly not true of lumber, it is not true of cement, it is not true of glass, it is not true of steel. It isn't true of anything that I can think of, including some of our own company products.

[9356] By Mr. KECK:

Q. Do you have any company building materials other than gypsum that show a fall off between 1967—fall off in price, realized price, between 1967 and 1973?

A. No, sir.

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[9406] The COURT. Now, I have two questions, sir, for you from members of the jury.

First is this: From the year 1966 to 1973, from a profit standpoint, which year, in combination of realized prices and market share, would you select as the best? And that's from a profit standpoint?

The WITNESS. For the total of my responsibility?

The COURT. Yes. Of course.

The WITNESS. I have a little trouble with this because I am not as familiar with the profit figures prior to 1969 as I have been since then.

The COURT. Well, amend the question then from 1969 to 1973 so as to cover the years which you [9407] were.

The WITNESS. Would you restate the question, please.

The COURT. All right.

From the point of view of profit, from a profit standpoint, which year, considering a combination of realized prices and market share, would you select as the most satisfactory to your corporation?

The WITNESS. That is not asking the dollar amount of profit?

The COURT. No. From the profit standpoint, which combination of realized price and market share would you pick?

The WITNESS. I would pick 1968.

The COURT. All right.

Now the second question: Do zone areas tend to increase or decrease in population density or area as competition increases?

The WITNESS. I am sorry, would you read the question again, please.

The COURT. Do zone area tend to increase or decrease in population density or area as competition increases?

The WITNESS. I think zone areas tend to decrease as competition increases. Zone population is [9408]—um—there is a little in conflict. The area could decrease, and of course the total population would then tend to decrease. I don't know whether I am answering the question or not. I don't really have any accurate information on that.

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CROSS-EXAMINATION

[9422] By Mr. THORSON:

Q. You have been handed two documents.

One is Government Exhibit 5055 and the other is U.S.G. Exhibit 63. I ask if you can identify them.

A. Yes, sir, I can.

Q. 5055 is a memorandum to you from Mr. Morgan that you signed.

A. Well, it is my signature and the memorandum is from Mr. Morgan, and I seem to recall that this had wide distribution in our—throughout our company management group.

Mr. THORSON. If Your Honor please, I offer in evidence, GX 5055.

Mr. KECK. No objection.

The COURT. Admitted.

[Government Exhibit No. 5055 was received in evidence.]

By Mr. THORSON.

Q. And the copy of the memorandum that bears your signature is dated February 14, 1962, is it not, in the upper right-hand corner?

A. It has stamped in there February 14, 1962, yes.

[9423] Q. It was originally typed a day earlier?

A. That is correct.

Q. Does that stamp signify the date that you received it?

A. Yes, that is the stamp my secretary would have put on my incoming mail.

Q. And when this memorandum was given to you, did it enclose a copy of a memorandum which is identified as U. S. G. Exhibit 63?

A. Yes, sir, as I recall, it did have this memorandum attached to it.

Q. And that memorandum is a memorandum prepared in conjunction with the law firm in which Mr. Keck is a partner, is it not?

A. Yes, it is that. It states that at the top of the memorandum.

Q. Was that memorandum circulated to you by Mr. Morgan in giving you authorization to discuss and exchange prices with competitors?

A. Well——

Mr. KECK. I object to this question and this line of questions. We have been over this seven or eight times as to the

question of authorization or whether this is a policy manual or a statement of legal position. I see no purpose to be gained. I think it is irrelevant and [9424] you have sustained objections to this question in the past, to the use of authorization.

Mr. THORSON. If Your Honor please, I think the same question has been asked and answered from other witnesses of U.S.G. and the witness can either answer yes or no.

The COURT. You are asking him whether in his opinion this authorizes him to do that?

Mr. THORSON. Yes, Your Honor.

The COURT. You can answer it yes or no and that is the end of the inquiry.

In other words, in your opinion, and that is all you can give. Otherwise the document speaks for itself.

In your opinion, did that authorize you to——

The WITNESS. In my opinion, it did.

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[9482] ROBERT S. CAMEL

DIRECT EXAMINATION

Q. Would you describe for us any discussions that you had with Busy Beaver with regard to price?

A. Well, they were, of course, pricing—when we got into 1968 and '69, it became very volatile, so pricing was always discussed and it just got to a point we had—first we had one 5 and then we had two 5's and I can remember walking in and sitting down with Jack Fagan—he [9483] was the president of Hard Materials and he also was an officer in Busy Beaver—and he would pull out a dollar bill and say let's say let's play "liars poker."

And say, "I have had four 5's."

I would take out a bill and I said I had four 5's and if he said he had five 5's, I was out.

I don't think it was too scientific, but—we had other instances like that. It was a chaotic atmosphere.

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DISCUSSION

[9499] The COURT. Put your witness on the stand and let him testify to that.

Mr. FRICANO. But, Judge, the impact on the jury at the time with a chart like that. When you bring out a chart and you have a little piece of tape masking over the little goodies, and you rip one off and then rip the next one off, the impact on a lay jury, Judge. I am sorry. I am sorry, sir.

The COURT. Will you get one of those tranquilizers for Mr. Fricano.

Mr. FRICANO. I need more than a tranquilizer. I need this Court—I need this Court—

Judge, in December of 1974 in this very courtroom Mr. Keck—Mr. Keck said he didn't have anything. I got it in a transcript. He said they didn't have anything.

That witness said they had the stuff in the computer at that time. And you said you wouldn't challenge Mr. Keck's integrity. I have got it right in the transcript, Judge.

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[9500] • • •

Mr. KECK. Could he take the tranquilizer now, Your Honor, on this point? I'd like to respond to this, but we are not before the jury.

The COURT. You will get a chance to.

Mr. FRICANO. If I am emotional—If I am emotional, and if I am shaking, it is because what has been happening in this courtroom for the past two weeks, Your Honor.

And I don't have to—I don't have to—When I present a matter to a Court of the United States, I get uptight, because it is a heavy—a responsibility which I feel very keenly about, or I wouldn't be doing it.

Now, okay. So, fine, so I am emotional. I have [9501] been had. My staff has been had.

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[9531] • • •

Mr. BARTLIT. No, sir. It is a different point.

And it is this, Your Honor: I think respectfully that there is danger in Mr. Fricano getting the idea that because he is emotional he can do things. Like the argument he just made.

The COURT. I have just said that will have no effect whatsoever.

Mr. BARTLIT. I know, Your Honor. What I am saying is this: That I have never experienced with counsel the insulting

finger-pointing, shaking the finger in the face tactic that I have seen today before, that I have seen in this courtroom.

The COURT. Mr. Bartlit, he has done it to me, too.

Mr. BARTLIT. I know that, Your Honor. And what I am saying is that hasn't happened to me. But if it does, I am emotional, too, and I don't think it ought to be happening. I am not sure I can sit there and have a man do that to me. I don't think Your Honor could, sitting there under the gun like that . . .

The COURT. Oh, I have.

Mr. BARTLIT. I know, Your Honor.

The COURT. However, I recognize—[9532] and I have tried to say—that I want emotion taken out of this, and I have even offered the availability of tranquilizers. I can't do anything more than that.

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[9720] ROBERT OBERKIRCHER

DIRECT EXAMINATION

• • •

Q. Now, can you tell me what, generally, has been the range of unit cost for half-inch wallboard at National Gypsum's plants and I am talking about from 1960, generally, to 1973, at each plant, say, at the same time.

A. Well, the range of costs, you mean one plant versus another——

Q. Yes.

A. —the high and low within the group of plants?

Q. Right, right.

A. The range of costs in that period would run around $15—the low may be $17 and 28, 30, 32, is the high.

Q. Would this be for the half-inch wallboard?

A. Half-inch wallboard, yes, sir.

Q. Per thousand square feet?

A. Per thousand square feet.

[9721] Q. And that would be comparing one plant with another plant at the same time?

A. Yes, sir.

Q. So that if you compared one plant of National Gypsum Company in one part of the country, that plant, with another one in another part of the country, you might get as much a difference as $15?

A. To $30, right.

Q. Which plant has historically been National Gypsum's lowest cost plant?

A. Rotan.

Q. Where is Rotan?

A. That is——

Q. Is that in Texas?

A. In Texas.

Q. What market does that plant serve?

A. Basically the Texas and Oklahoma market, normally.

Q. Do you know what costs, what the actual unit costs at Rotan—let's take half-inch wallboard, for example—have been in the period 1960 to 1973?

A. It was one of our lowest cost plants, so it would be in the $13 to $18, $16, $17, somewhere in through there.

Q. Now why would plant costs vary so much among plants at the same time?

A. Well, again, speaking generally, you have to know [9722] the specific plant that you were talking about in order to tie this down. But, generally, there would be two or three factors.

The rock supply that the plant uses, the paper supply that it uses for the cover of the board, the age and the speed and the efficiency of the plant, the design of it would have been built for certain output, so you could be talking capacity.

So you would be talking basically the supply of its basic materials and the speed at which and the efficiency at which it moves, and those are different plant to plant.

Q. I see.

You have got two, basically two categories?

A. Two categories.

Q. Supply and efficiency?

A. Right.

Q. Now, what are the factors that would affect supply? Why would one plant be able to save money on its supply, where another would not?

A. Well, it depends on the—for instance, in rock, your seaboard plants would get their rock from Halifax and your plants

like the inland plants would have their own rock supply, and would have either their own mine or quarry there.

Q. So what you are saying is some plants are closer [9723] to the source of supply than others?

A. In the case of rock or they have it right there, yes.

Q. Is Rotan close to a source of supply?

A. Rotan has its own quarry.

Q. What about paper?

A. Well, paper would be somewhat of the same nature. The proximity to the paper plant would, of course, make the freight cheaper or more costly and the cost of the paper plant itself, as it produces its paper. All our paper plants have different paper costs.

Q. You mentioned freight. You mentioned freight——

A. On the paper to the plant.

Q. To send the paper to the gypsum plants?

A. To the gypsum plants.

[9724] By Mr. Cortese.

Q. You mean then before freight on the finished product, that is what National Gypsum has to pay in freight, goes in the delivered price, that would be an element of cost overall, rather than a plant cost, would it not?

A. The freight that National would pay to deliver the product to the customer would be a reduction of sales in our accounting system.

Q. Now, on the paper cost, does Rotan have a readily available paper supply?

A. The Pryor plant.

Q. Pryor, Oklahoma?

A. Right.

Q. You mentioned plant efficiencies. Is Rotan a relatively efficient plant?

A. Yes, sir, it is a high-speed plant.

Q. Is it a high-capacity plant?

A. Yes, sir.

Q. Now, Mr. Oberkircher, are you familiar with the term "mill net"?

A. Yes, sir.

Q. What are mill nets?

A. Mill nets, in my definition are—is the sales value we receive from the customer for the shipment made to him less the

freight that we have to pay to deliver it. [9725] It is the net of the two, and the mill net merely refers as another way of saying plant.

Q. I see.

So you take the, basically, the net it receives at the plant for the board that is sold, is that right?

A. And deduct the freight.

Q. And deduct the freight?

A. That the plant has had to pay.

Q. And that is the freight it cost National to ship the board——

A. To the customer.

Q. —to the customer?

A. Right.

Q. Now, basically, what do mill nets measure for your purposes?

A. For my purposes, mill nets measure the sales realization that the plant is able to incur on it out of that particular shipment. It is the monies that we realize from the sale.

Q. It is what you get out of the sale?

A. That is what we get out of it, right.

Q. Now, does the company measure mill nets for various products?

A. Yes, sir.

Q. What particular product is used as an indicator? [9726]

A. In the case of gypsum, it is half-inch wallboard, because of its predominance in the quantity of wallboard.

Q. About how much half-inch wallboard is produced in comparison to the total wallboard products, other board machine products?

A. Over 50 per cent.

Q. In other words, half-inch represents over 50——

A. Of the total.

Q. --per cent of board machine products?

A. Right.

Q. That would be in dollars or quantities or both?

A. Certainly in footage and quantities.

Q. In what we call MSF or thousand square feet?

A. Right, right.

Q. Now, have you examined the trend of half-inch wallboard mill nets during the period 1960 to 1973?

A. Yes, sir.

Q. Have you made a study of those, of that trend?

A. Yes, sir.

• • • • • •

[9858] DONALD KENT

DIRECT EXAMINATION

• • •

Q. And when did you go to work for National Gypsum [9859] Company?

A. 1954.

Q. What has been the field of your work in National Gypsum——

A. Since——

Q. —since you went there?

A. In the credit management field.

Q. Have you been a division credit manager?

A. Yes.

Q. Beginning when, approximately?

A. About '54.

Q. Is that still your job——

A. No.

Q. —or was it changed some time?

A. It was changed. Division Credit Manager from '54 to '64, and roughly until '69 as Regional Credit Manager, and since then a Zone Credit Manager.

• • • • • •

[9861] By Mr. DeLone:

Q. Did there come a time during the course of your work as a regional credit manager when you were in touch with competitors to check reports that had been received from the field with reference to an alleged—with reference to a customer's claim he had been offered better terms by a competitor than by National Gypsum?

[9862] A. Yes, there did.

Q. When did you first make any such check, as best you can recall it?

A. Roughly in 1967–'68, somewhere in there.

[9863] Q. And at whose request?

A. Mr. Barber's.

Q. Now, are you able to give us any—during what period of time did you engage in such checking with reference to a customer's claim that he had been offered better credit terms by the competitor?

A. Say in that '67—1967–68 period.

Q. And are you able to estimate approximately how many occasions you may have been asked to check with a competitor?

A. It is an estimate, but I would say that I was asked on probably about 15 occasions, during that time.

Q. And did you also, during that period, receive calls from competitors who were making similar checks to determine whether National had offered special credit terms to a customer?

A. Yes, I had.

Q. Did you have any authority to grant special credit terms to customers of National Gypsum?

A. No, I had no authority to do that.

Q. Did you have authority to decide whether National Gypsum would meet an offer of better terms that was reported up to you from the field?

A. No, I did not.

* * * * *

[9865] Q. Did anyone ever instruct you not to record your—the results of your calls to competitors?

A. No, they never did.

Q. Did they instruct you to record them?

A. No.

Q. But I take it you did record them.

A. Right.

Mr. DeLone. May the witness have, please, National Gypsum—I am sorry—Government Exhibit 982? This document is already in evidence.

By Mr. DeLone:

Q. This is a memorandum from you to Mr. Atwell—[9866] I am sorry—to Mr. Nicely and Mr. Barber, with a copy to Mr.

Atwell, dated 9/22/67, dealing with the subject, "21st cutoff, dealer gypsum products, Clay and Jackson Counties in Missouri."

You wrote the memorandum; did you not?

A. Yes, I did.

Q. Now, why did you direct it to Nicely and Barber, with a copy to Atwell?

A. Well, this was a normal format for an approval of this type of thing, number one to Mr. Nicely and number two back to Mr. Barber.

Q. For an approval of what?

A. A discount exception procedure, which this happens to be, a 21st cutoff request, rather than an individual account.

Q. This is a 21st cutoff request covering the counties of Clay and Jackson in Missouri; right?

A. Right.

Q. Now, in this instance, the memorandum reads:

> On September 19, R. D. Barber spoke with Bill Hogan, USG's General Credit Manager. Hogan confirmed USG is allowing 21st cutoff on gypsum dealer products shipped into Clay and Jackson Counties of Missouri. These two counties comprise a portion of the metropolitan area of Kansas City, Missouri. Since the [9867] entire state of Kansas is allowed 21st cutoff date, it is only realistic to grant the same terms to the metropolitan area of Kansas City, Missouri.

And did you have that conversation with a Mr. Hogan or did Mr. Barber have it?

A. No, Mr. Barber had the conversation.

Q. And then he asked you to write up the memorandum; is that right?

A. Correct; right.

Q. Well, now, would you look at——

Mr. DeLone. Might the witness have Government Exhibits 993 through 995?

By Mr. DeLone:

Q. Do you have those papers before you, Mr. Kent?

A. Yes, I have.

Q. Will you look through them, please? There is a collection of them. They all deal with the subject of Montgomery Craw-

ford Company of South Carolina, Aiken, South Carolina. That's 993, which consists of three pages; 994 and 995—each of the latter is one page.

Now, I want to understand how this process worked. 993 has, at the back of it, a request to meet competition form. Do you see that?

A. Yes, I do.

Q. And that bears the originator's signature, [9868] A. H. Stephens. Who is A. H. Stephens?

A. He is the Atlanta district sales manager.

Q. And then, the next page, the middle page of that document is a memorandum from Mr. Stephens to Mr. Arnold. Who is Arnold?

A. He is the southeastern—or was southeastern division sales manager, and Stephens' superior.

Q. Stephens signed the form and sent it on to Mr. Arnold, requesting to meet some special terms that Georgia-Pacific was allowing to Montgomery Crawford Company?

A. Right.

Q. And then Arnold transmitted the document, the request, and Mr. Stephens' letter, up to Mr. Atwell; is that what the top page indicates?

A. That is correct.

Q. That's an August 12, 1968, memorandum from Arnold to Atwell. And I see 994, still on this same exhibit, your memorandum to Mr. Barber of August 20, 1968, which reads:

> Subject, Montgomery Crawford Company of South Carolina, Aiken, South Carolina.
>
> I spoke with Mr. C. T. Turner, Regional Credit Manager, Georgia-Pacific Company, Atlanta, Georgia today. He said they have no special cash discount terms for this customer. They just turned down a request for five percent second 10th prox terms.

[9869] Did you call Mr. Turner and ascertain that information?

A. Yes, sir; I did.

Q. And then you made a report of that to Mr. Barber?

A. Yes.

Q. Why did you call Mr. Turner?

A. At Mr. Barber's request.

[9870] By Mr. DeLone:

Q. And, finally, look at GX 995.

Let me withdraw that for a moment.

Was the report that was originally transmitted up from Mr. Stevens a report that Montgomery Crawford of South Carolina, Incorporated, had claimed to have been offered 5 percent second month 10th prox terms?

A. Yes.

Q. And was claiming such an offer had been made by Georgia-Pacific?

A. That's right.

Q. But when you called Georgia-Pacific you found that not to be accurate; is that correct?

A. Correct.

Q. Incidentally, there is some writing on the request to meet competition, the third page of GX 993. Is that your handwriting there?

A. It is.

Q. Would you read just in the lower right-hand corner above the signature of Mr. Stevens—I guess it is—the writing is sort of on a diagonal. What does it say?

A. It says, "Credit responsibility is adequate. D. D. Kent, 8/20."

Q. So you commented on the credit worthiness of the customer, but then in GX 994 reported that you were unable [9871] to confirm a customer's claim of an offer of better credit terms when you called Georgia-Pacific?

A. Correct.

Q. And in GX 995, the net of the transaction, the net result, is that Mr. Atwell advised Mr. Arnold that they were unable to verify the customer's claim, and therefore the special terms would not be extended.

A. Correct.

Mr. DeLone. Might the witness now have Government Exhibit 985, 986 and 987.

By Mr. DeLone:

Q. Would you glance through those papers, Mr. Kent. I think you may have seen them all in the course of the last day or so anyhow, but be sure and know which ones I am calling your attention to now.

Have you looked through them?

A. Yes.

Q. Near the top item of GX 985 is a note on the buckslip from the desk of K. H. Atwell signed "Ken." It is directed to Bob Barber.

> Bob:
>
> Would you please attempt to verify this?

And if you go to the back page of that document you will see the request to meet competition made with reference to Cedar Rapids Lumber Company; do you not?

[9872] A. That's correct.

Q. And they were claiming that U.S.G. had offered special terms, 2 percent 3rd 20th prox.

A. Correct.

Q. That was more liberal—was it not—than the terms of which you were then selling gypsum wallboard?

A. Yes, it was.

Q. And that competitive request to meet competition was forwarded to Mr. Avant. Who was he?

A. He was the Division Sales Manager in the Great Plains Sales Division.

Q. And it was forwarded to a Mr. Barber?

A. That's correct.

Q. Who was Buffalo Central Region Sales Manager.

A. That's right.

Q. And then there is some writing. I am looking at Mr. Avant's memorandum of June 7, 1968, which is part of this. There is some writing on that showing Don Kent, Credit Department, K. Atwell.

A. Correct.

Q. Numbers 1 and 2.

Was this the normal routine, that the Regional Sales Manager would send something like this to you in the Credit Department?

A. No, it wasn't routine. Gerber sent it to me out [9873] of routine and I put it back into the flow.

Q. You put it back into the flow with the memorandum you wrote on 6/11? Let's back up for a minute.

The request to meet competition is June 6, 1968; is it not?

A. That's correct.

Q. So that all of this is occurring in June of '68.

You say you put it back in the flow. You are talking about your memorandum to Ken of June 11?

A. Correct.

Q. It said:

> Bill Gerber sent me this. Actually you should see them before credit reviews.

A. Correct.

Q. And did you ultimately make a review of this or become involved in this matter? And in that regard I call your attention to GX 986.

A. Yes, I did.

Q. How did you get involved in it?

A. Well, again Bob Barber asked me to confirm these terms of sale, or alleged terms of sale, or verify them with U. S. Gypsum.

Q. And as indicated in GX 986, you did confirm them?

A. I spoke with U. S Gypsum, and they reported no special cash discount terms established.

[9874] Q. So this is your June 14th memorandum, June 14, 1968, directed to Mr. Barber. And then his name is stricken out and it is directed on to Mr. Atwell.

It reads:

> June 14th I spoke with Don Havertine, Regional Credit Manager, U.S.G. They have no special cash discount terms established for this account.

A. Correct.

Q. And, as a consequence, was the customer's request for special terms to meet the alleged U.S.G. competition declined? And I call your attention to Government Exhibit 987.

Do you have that? Maybe I didn't ask to have it put before you, 987.

A. Yes. Confirms it. You said it was rejected.

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[9875] Q. Now, when you made these checks, which are illustrated by the documents we have been through—and you don't need to worry about the documents any more, Mr. [9876] Kent—whom did you call in the competitor companies?

A. Well, I called whatever credit manager with whom I had had previous contact for ledger experience.

Q. Now, did there come a time when you—You indicated earlier you made such calls in 1967 and '68. Did there come a time when you stopped making such calls?

A. Yes.

Q. When was that?

A. January of '69.

Q. And what occurred at that time to lead you to cease making any such calls?

A. Mr. Barber called a meeting in his office of the various credit managers in the department and advised us that upon National's advice by counsel we were to discontinue that practice.

Q. And did you discontinue the practice?

A. Yes.

Q. So far as you know, did the other credit men who worked with you also discontinue?

A. Yes, they did. As far as I know.

Q. Were they present at this same meeting with Mr. Barber?

A. Everyone that I can recall that was in the department that was involved in anything in talking with competitors was in this meeting.

[9877] Q. I have shown you some illustrations of the verification calls in which you participated, the checking with competitors, and you have seen a sampling of them. When you made such calls, I understand your testimony to be that you made them at Mr. Barber's request. When you made them, did you make a record of the call that you had made?

A. Yes, I did.

Q. And did you report that back to Mr. Barber?

A. Yes.

Q. And what was the procedure after Mr. Barber got your report, so far as you know?

A. As far as I know, he passed them on to the Pricing Policy Department.

Q. Who had the ultimate decision whether or not to grant the special terms that the customer claimed he had been allowed by someone else?

A. If the credit responsibility was adequate, then the Pricing Policy Department made the final decision.

The COURT. All right, we will take a ten-minute recess.

[Recess taken.]

[9878] The COURT. Proceed.

By Mr. DELONE:

Q. Mr. Kent, you indicated that after this meeting with Mr. Barber in January of 1969 you had not made any other calls to a competitor to check a claim of a customer that they had offered some special credit terms. You recall that?

A. That's right. That is correct.

Q. Did you receive any calls from competitors after this meeting with Mr. Barber that you had described?

A. Yes, I did.

Q. And how did you respond to such calls?

A. We just responded that we could not discuss terms of sale.

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CROSS-EXAMINATION

By Mr. THORSON:

Q. All right. I understand, Mr. Kent, that you had no authority to extend special credit terms; is that correct?

A. That is correct.

Q. And you stated that it was the price and policy people within National who did?

[9879] A. That is correct.

Q. And can you identify those people in National who did have that authority?

A. No, I couldn't do that. I don't know who it was.

Q. Do you know who headed up the price and policy department within the company?

A. I believe it would have been Mr. Atwell, Ken Atwell.

Q. Now, there is testimony that Mr. Atwell was manager of sales administration at one point of time. Are you referring to the same department?

A. Yes, I think that is one and the same, sales administration, price and policy. Its function, generally speaking, is all the same as far as I know.

Q. And was this part of the jurisdiction of Mr. Nicely who was vice president for sales?

A. These Mr. Nicely and Mr. Barber approved. For instance, in that one, the special terms of the 21 cutoff, which was not one account; that was a county area, Mr. Nicely did have authority in this area.

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[9882] Q. Did you have any contacts with Kaiser?

A. This particular one, right here, refers to John Vale.

Q. At Delanco, New Jersey, was it?

A. Delanco, New Jersey, for Kaiser Gypsum Company.

Mr. DeLone. Might I ask, if he refers to this particular one here? Could we have identification of the document that he is referring to?

The Witness. GX 992.

By Mr. Thorson:

Q. How about with Flintkote?

A. I had contact with Flintkote, and, if I saw the [9883] documents or you mentioned the name, perhaps I could get it, but I don't recall at the present time.

Q. How about Johns-Manville?

A. Yes, we had contact with all of those people, those credit managers, or all of those companies.

• • • • •

Q. In those instances where competitors called you and you did respond, what business reason did you have for acknowledging or responding to the calls during the period that you did?

A. I don't understand. Would you give me that again?

The Court. He wants to know why you answered them.

The Witness. I answered them with credit experience or ledger experience, out of a courtesy to them.

By Mr. Thorson:

Q. How about with respect to calls concerning the extension of special terms?

A. When they called about special terms, we just declined to discuss it.

Q. In all instances?

A. In all instances, after January '69.

Q. All right. Referring to that period before [9884] January——

A. In and before January, '69, in that '67–'68 period, somewhere, we responded.

Q. Why did you respond in those instances?

A. Out of courtesy to the company that was inquiring. We inquired; we had to, in turn, respond to inquiries.

Q. Did you know why they wanted the information?

A. No, not usually, any more than they knew why I wanted it.

Q. Did you ask them whey they wanted the information?

A. No. It was, generally speaking, or usually, an inquiry that said, "XYZ Lumber Company reports that National is extending these terms, and we would like a confirmation."

Q. Was this to help your competitor make a business decision?

A. I don't know what it was. It was an exchange of credit information.

Q. Did you know whether the competitor wanted that information for assistance in making a business decision of its own?

A. I didn't ask what he was going to use it for, so I don't know.

Q. Did you think the competitor wanted it to help him [9885–9895] make a business decision?

A. Every credit inquiry is to make a business decision of some sort, in the extension of credit——

Q. And——

A. —in itself.

Q. Did your competitors ever ask you why you wanted the information when you called and asked them?

A. No, because I prefaced the call by the statement that this particular customer indicated that he had been offered or was receiving these terms from that particular creditor.

[9896] By Mr. Thorson:

Q. And so would it be correct to understand that you, National, wanted the information in order to make a decision as to whether or not to offer special terms to the customer?

A. We needed the information to respond to the customer's request for a competitive offer.

Q. Did you personally speak with any of the customers who made these requests?

A. No, I did not.

Q. You testified that you did speak with other suppliers of those customers?

A. Right.

Q. Including gypsum wallboard competitors of National?

A. Correct.

• • • • •

[9904] Q. Mr. Kent, was there any period of time in which these conversations were more frequent than other times?

[9905] A. No. Well, probably it started off with one and then, later on, two, picked up a little, till we stopped.

Q. So the frequency was increasing during the time——

A. Increased, I would say, yes.

Q. And this would be over the period from 1967 to January, 1969?

A. Right.

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[9978] • • •

The COURT. Now, what about Colon Brown?

Mr. FRICANO. 441.

The COURT. Colon Brown. What did he have to do with pallets?

Mr. FRICANO. If Your Honor please, he was in charge of the whole corporation.

The COURT. I haven't heard any testimony that he knew they had pallets.

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[10,037] • • •

The COURT. I have had arguments on motions to strike. The motions to strike—to strike the testimony are denied.

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[10,061] • • •

DONALD J. CROWELL called as a witness, having been first duly sworn, was examined and testified as follows:

Mr. KENT. Would you give your name [10,062] to the Court?

The WITNESS. Donald Crowell.

DIRECT EXAMINATION

By Mr. DELONE:

Q. Mr. Crowell, will you try to keep your voice up and speak into that microphone?

A. Yes, sir.

Q. Your full name is what?

A. Donald J. Crowell.

Q. Where do you live?

A. Buffalo.

Q. Are you currently employed by the National Gypsum Company?

A. I am.

Q. In what capacity?

A. I am the director of information systems for the Building Products Division.

Q. And how long have you been director of the information systems of the Building Products Division?

A. A little over three years.

Q. What is your job responsibility?

A. I am responsible for the programming data processing function, basically, of the Building Products Division, the data entry, the checking of the invoices on a daily basis, the whole output distribution.

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[10,088] • • •

Q. Mr. Crowell, just so I understand, you refer to [10,089] the number of approvals by competitors as being inflated. Will you look at National Gypsum's 352?

A. Yes, sir.

Q. And that indicates that instances of approval—this is the total, and it is noted on 351, but there isn't a total figure there—352 indicates the number of times when a price cut was authorized to meet a competitor at 47,730, in the five-year period.

A. That is correct.

Q. Now, there is duplication—do I correctly understand there is duplication because some of the forms list more than one competitor whose competition is being met?

A. Yes, sir. That is correct.

Q. So when you turn to National Gypsum Exhibit 354, which has just been received in evidence, that indicates the percent of the discount from list price?

A. Yes, sir.

Q. And there, the total is 34,528?

A. That is correct.

Q. Now, in that instance, you count it in a given situation, you might have had three or four competitors who were offering to a particular customer five percent off list, and, if National Gypsum—all reported on one RTMC, and, if National Gypsum met that price, authorized the meeting of that price, that was scored only once in that count; is that [10,090] correct?

A. Yes, sir. We are meeting it to a customer in a case.

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[10,304] • • •

JOHN PATRICK HAYES called as a witness, and having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined and testified on his oath as follows:

Mr. KEENE. Would you give your name for the Court, please.

The Witness. My name is John Patrick Hayes.

DIRECT EXAMINATION

By Mr. DELONE:

Q. Would you give us your full name, please, Mr. Hayes, and your address.

A. John Patrick Hayes, 63 Ruskin Road, Eggertsville, [10,305] New York, 14226. A suburb of Buffalo.

Q. And you are connected with National Gypsum?

A. Yes, sir.

Q. What is your present job with National Gypsum Company?

A. I am a Corporate Group Vice-President and a Director.

Q. How long have you been employed by National Gypsum Company?

A. Since February 1st, 1947.

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[10,311] By Mr. DELONE:

A. I was transferred to a position as Assistant to the Chairman of the Board.

Q. When, just so we can get that time frame?

A. That was in the Spring of 1967.

Q. At that time, who was the chairman of the Board of National Gypsum Company?

A. Mr. Colon Brown, the present Chairman of the Board.

Q. And was that—did you say that was in the Spring of 1967?

A. Yes. Let's see. I guess it was closer to the first of the year.

[10,312] Q. Some time in the early part——

A. Right.

Q. —of 1967. Was there a president of the corporation at that time?

A. No, not at that time. Actually, technically, I believe the chairman held both titles.

Q. But there was——

A. There was no individual——

Q. —chairman of the board?

A. —who was an individual president?

Q. Was Mr. Brown also the——

A. Yes.

Q. —chief executive officer?

A. Yes, was and is.

Q. And you took that position in early 1967 as Assistant to Mr. Brown. Then, how long did you continue in that job?

A. I was in that job until January of 1968.

Q. As Assistant to the Chairman of the Board from early '67 to early '68, how would you describe or define your job repsonsibility?

A. Well, an assistant to does most anything. It is—I was involved in anything that came before his—came to his office, and that involved all the divisions. There are—at that point, we had the two cement companies and [10,313] the ceramic tile company, and subsequently others, but it involved all areas, any problem in any area, anything that came to his attention.

Q. That he asked you to direct your attention to?

A. Yes, sir.

Q. And did you—I know you are not still Assistant to the Chairman. What was your next position?

A. January of 1968, I went back to the Building Products Division as Vice President, Merchandising Operations, and in that capacity I had reporting to me the sales department, the marketing department, and the research and development.

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[10,314] Q. We have had some previous discussions here of the difference between line responsibility and staff responsibility. This job as Vice-President of Merchandising Operations was a line job, is that right?

A. Yes, it was a line responsibility.

Q. And you were responsible for the sale of the products of the then Building Products Division, is that correct?

A. Yes.

Q. And the marketing, what does the marketing involve?

A. Marketing is a staff support to sales. You might say that marketing designs the snowballs and sales throws them.

Q. And the third was research and——

A. Research and——

Q. —development.

A. —and development.

Q. Then you had, beginning in January, 1968, the overall responsibility for the sales of what products, now, in the Building Products Division?

A. Well, there was—all of the products in the Building Products Division, and that encompasses the gypsum products, which were approximately half of the division, [10,315] perhaps a little more, paper, lime—we have four lime and limestone plants—metal products—at that time we had in addition three asbestos cement manufacturing facilities—tectum roof deck products—we had two plants producing those. At that time we had a paint business, subsequently sold. It was a broad line of products.

Q. And you say that the gypsum products constituted about half of the total of the Building Products Division at that time, at least?

A. Yes, sir, at least half. Maybe a little bit more.

Q. And you mentioned metal products.

A. Metal products.

Q. Of what type?

A. Well——

Q. Made by the Building Products Division?

A. We——

Q. Sold by you?

A. We are not basic metal producers, obviously, but we fabricate metal studs, metal lath for plastering systems. We sell the type ceiling material that you see here and that has a metal guide that is holding up those ceiling boards. We had miscellaneous clips for our systems that we sell. We had some —quite a few proprietary tracks [10,316] and channels for use with our wallboard system and our other systems.

Q. Now, how long did you remain Vice-President of Merchandising Operations, or when did your job change?

A. I believe it was in the middle of 1969 I became President of the Building Products Division.

Q. I should have asked you, as Vice-President, who was the President of the Buildings Product Division when you were Vice-President of Merchandising Operations, January, 1968—

A. Well——

Q. —to the next change?

A. We didn't have one.

Actually, we were going through that transition period I referred to and the Chairman of the Board, Colon Brown, was acting as President of the Division at that time, also. When I became President of the Building Products Division in January of 1970—December of 1969, actually and then subsequently in January of 1970 we went through the final severance of the Building Products Division from the corporate staff functions.

Q. And at that juncture, then, were you beginning in 1970—I am sorry, in 1969, at the end of 1969 when you became President of the Building Products Division, that became a fully separated entity, one of a number of divisions, [10,317] is that right?

A. Yes. We had been tracking our sales and profitability as the other divisions had, but now from a man hour point of view we split off the other functions and became a separate entity completely.

A. And in that capacity, when you were President of the Building Products Division, to whom did you report?

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A. I reported to the Chairman of the Board, Colon Brown, as did all of the other presidents of divisions.

Q. And there were a number of other divisions also reporting to him?

A. Yes.

Q. Was the Building Products Division at that time the largest of the divisions?

A. Yes, it was.

Q. In terms of its——

A. Yes, it was.

Q. —sales?

A. Yes.

Q. And you became President of Building Products Division December, 1969.

Have there been changes since then?

A. Well, following in January—I believe it was January of that year I was elected Corporate Group Vice-President and also a Director of the Corporation.

[10,318] Q. You said Corporate Group Vice-President. Did you continue as President of the Building Products Division?

A. Yes.

[10,319] By Mr. DeLone:

Q. And——

A. Actually it didn't add to my responsibilities except as those of a director. But, understand, I was not a corporate officer at the time I became president of the Building Products Division, so at this point I became a corporate officer.

Q. But retained your basic responsibility of running the Building Products Division?

A. Which was—yes, running the Building Products Division.

Q. And do you have any additional responsibilities other than those that came to you as a member of the corporate staff, staff corporate group vice president and member of the board, have any been added since that time in 1970?

A. Yes, sir, in 1973, the spring of the year, about March, I had the EMH Mobile Home Division added to my responsibility as corporate group vice president, and there was a president appointed to the Building Products Division who now reports to me.

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[10,320] Q. When you became vice president of Merchandising Operations and the overall responsibility for sales, who directly reported to you with reference to sales?

A. Mr. Jay Nicely, vice president of sales.

Q. Have you ever been active in the Gypsum Association, Mr. Hayes?

A. Yes, I became active I believe it was in the spring of 1969, and subsequently served as a member of the board of directors of the Gypsum Association, and subsequently became president of the Gypsum Association.

Q. And during approximately what period of time was this?

A. I believe it was 1971, over the 1971 and 1972 year.

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[10,325] Q. Now, I would like to turn to the product with which we are mainly concerned here, Mr. Hayes, gypsum wallboard. We are concerned with all board machine products, but essentially the most important of them, and the one most focus has been on, is the product gypsum wallboard. How would you describe that product in term of what one makes, one company makes, versus what another makes; what is the relationship?

A. Well, there are a broad line of products made by the various manufacturers, and they don't always match. However, the bread and butter product is half-inch gypsum wallboard. That is common to all manufacturers.

Q. I have heard that described as vanilla. You call it bread and butter.

A. Well, I guess you could call it plain vanilla board, or it has a vanilla coated paper on it, so maybe that is what the derivation is. But that is the major product in the line and accounts for a substantial percentage of the volume that comes off the gypsum board machine, overwhelming volume.

Q. Now, are there major differences perceptible [10,326] to persons such as myself between the half-inch wallboard of one company, produced by one company, and that of another?

A. I doubt if the layman can tell the difference by observation. Some of the—we think ours is better. Obviously some of the contractors or craftsmen that work with the product can tell differences in weight of the individual manufacturers, but substantially—the weight of the different manufacturers' prod-

ucts—but substantially it's a similar product throughout the industry.

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[10,328] Q. Now, in your experience in the marketplace, you are familiar—you have talked about the bread and butter item or the plain varnilla item, the half-inch wallboard. Is it possible, over any substantial period of time, in your [10,329] experience, for one supplier of such board to sell to a customer who buys any substantial quantities at a price higher than can be obtained by another competitor.

A. It is rare.

Q. What factors other than price would lead a customer to pay more for one supplier's board than another?

A. Well, there are all forms of competition. Price is only one of the forms. Service is a form of competition. The weight of the product—in our case—we tried to make a form of competition.

The technical skills of the salesmen. I mentioned earlier that we have some 350 to 400 salesmen in the field, and they were providing help to the contractors, who were the users of our products, in helping them to bid the jobs. They were providing help to the dealers in what product they should promote with their customers.

We had very substantial research and development effort, and these research reports were made available to our customers and to architects and general contractors, telling them how to achieve various fire ratings and what systems to use, and approximate costs of those systems installed.

And so, we really pushed that side of the promotion of the product, because we were providing these services. And so I guess that's . . .

[10,330] Q. Over the long haul, were you able with major customers, however—despite these advantages you were offering—to sell at a consistently—or that you thought were advantages—at a higher price than the competition was offering?

A. No. The major buyer was buying half-inch wallboard for the mass use, and it was a repetitive sale. Service was important, but price was most important.

Q. Now, what can you tell us about the availability of gypsum wallboard, of the raw material for it, and the range of the capital investment required for one to enter the wallboard business, and with a large enough operation to be feasible?

A. Well, I guess—There are only about four things necessary to get into the gypsum wallboard business.

You have to have a source of rock, a source of paper, know how to put them together with a few additives. And, the money to do it. And in that order. Gypsum is a very common rock. It is found throughout the world in huge quantities. It is usually congregated in certain areas, the central part of the United States, Nova Scotia, western United States, broad bands in the Middle West from Iowa through New York State, and many, many foreign countries. So it is a very common thing.

White Sands, Nevada, is a form of gypsum, and that's [10,331] laying out there in the middle, right on the surface, in the middle of the desert area.

Next ingredient is paper, and it is readily available. We happen to manufacture our own. Some of the other gypsum wallboard manufacturers do manufacture their own, many do not.

It is available from people who are in the gypsum wallboard business, such as ourselves. We sell to outside customers, both domestic and foreign, but it is available from other companies in America who are not in the gypsum wallboard business, and they just sell paper as a supplier to the industry.

Q. You said you sell to outside companies. What did you mean by that?

A. Other gypsum manufacturers.

Q. You sell wallboard paper to other manufacturers?

A. Yes, sir.

[10,332] Q. And so do concerns which are not, themselves, manufacturers?

A. Yes. By way of example, Packaging Corporation, Container Corporation, and some other independents. So the paper is available. Now we get down to the know-how, since—I don't know how many gypsum plants, offhand, there are in America, but I guess there are probably 75 or 80 today, so that the know-how in a simple process such as this is readily available. People can be hired who know how to put the two products together

to make a gypsum wallboard, and that gets down to the matter of money. The investment that is necessary is not too large by the standard of going into business. It doesn't begin to get into the league of going into the steel business or going into the aluminum business or something of that nature.

Up until not too long ago, you could get into the gypsum business for six or seven million dollars total investment and finance in various ways, so the real cash investment was relatively small in terms of going into other businesses.

And we have a new plant under construction—well, the construction is in abeyance at the moment, but we started the construction, and we will pick it up again when we get out of this recessionary area that we are in, at Wilmington, North Carolina, and we have announced that the plant is going to cost, probably, some $14,000,000, and it [10,333] will be one of the largest in the United States, as large as anything we have, and I think it is as large as anything anybody else has in a single-line plant, and it will—the sales from that plant will be about $14,000,000 a year, $15,000,000 a year, so it is a dollar-for-dollar investment.

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[10,334] Q. Mr. Hayes, before the luncheon recess, you had described both the nature of the bread and butter product, if we can call it that, or plain vanilla, and the inability of your company, over a very extended time, to sell one-half-inch wallboard at higher prices than your competitors, and had also dealt with the subject of the—of the—well, the availability of the raw materials, the financing, etc., for someone to get into the gypsum business.

Now, I would like to go forward from that and have you explain a little bit about what creates the demand for gypsum wallboard and how, if at all, that bears on the pricing of the product.

A. Well, the——

Q. What is the product used for, primarily or mainly?

A. The product is used for walls and ceilings in residential construction, mainly, but also in commercial [10,335] construction and in hospitals, schools, other types of construction products, and, therefore, the demand for the product varies in two ways. It varies with the amount of construction that is going

on in the country—and remember that that is a very cyclical business, it has wide swings in the number of houses started in a given year, and then it is seasonally cyclical, so that the gypsum product is more heavily in demand during the third and fourth quarter of the year, for example, because of seasonal influences, than it is in the first quarter of a given year.

Q. Now, can you, by dropping the price of gypsum wallboard, can you increase the demand for the product?

A. No. It is almost no increase in the demand for the product from a price point of view. If—there isn't going to be anybody, really, remodel one more room in a house or build one more room in a—build one more house because of the price of gypsum board.

Q. Why is that?

A. Well, I guess maybe an example is better. In a typical $30,000 house, there is probably roughly 5,000 square feet of gypsum wallboard used, and, if we gave away the product free and delivered it to the job for them, you would only cut the price of the house by about $300, and nobody is going to be building one more $30,000 house because of a $30,000 change—or $300 change.

[10,336] So, the demand for the product is very seasonal, and it varies by the construction cycle the whole country is in.

Q. • • • I want to turn, then, to the subject of the responsibility for published prices within National Gypsum during the period since you became Vice President, Merchandising, which was in early 1968.

Mr. DeLone. May the witness have, please, National Gypsum Exhibit 384? There is a stack of them there; is there not?

By Mr. DeLone:

Q. What is National Gypsum 384?

A. Well, this is a memo, confidential memo, from the Chairman, Mr. Colon Brown, to me.

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[10,337] Q. And it is a letter from Mr. Brown to you on the subject of corporate policy concerning pricing?

A. Pricing in the Building Products Division.

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Q. Now this memorandum is dated May 28, 1970 and reads as follows, Mr. Hayes:

> Re corporate policy-pricing Building Products Division.
>
> This memorandum will confirm the existing corporate policy by which the final responsibility and authority on selling price structures rests with the corporate chief executive officer.

Who was the corporate chief executive officer at this time?

A. Mr. Colon Brown.

Q. Going on:

[10,338] Under this policy, corporate management may delegate day-to-day administrative decisions to the Building Products Division as needed to accommodate a separate policy when applicable to maintain a complete competitive position. Such delegation is currently in effect.

At this time, in May of 1970, you were in charge of, you were president of the Building Products Division?

A. That is correct.

Q. So you had authority to make day-to-day Building Policy decisions?

A. Correct.

Q. It goes on:

> The policy requires that corporate management approve before the fact any action contemplated with regard to published prices. I would, therefore, appreciate strict administration by your office to assure compliance with this requirements as it relates to all gypsum board products.

And there is handwriting on this document. Is that handwriting yours?

A. Yes, it is.

Q. I think I had better ask you to read it. You probably have a clearer copy. It is not very long.

A. There are two sections. One section says, "Do [10,339] not change published"—underlined—"prices without review with CB."

That is Colon Brown.

The next section says, "Maintain posture of meeting competition without publishing where competitive published price is below our current list."

Now do you want me to explain what that is?

Q. Were these notations you made on the document at the time you received it?

A. Yes, shortly afterward, yes.

Q. And they haven't been put on recently?

A. No, they were put on within hours of the time that——

Q. Yes, what did you mean by the second part of this?

A. Well——

Q. The first note is you can only meet published prices after review with Mr. Brown.

A. This is my note to me, my analysis of what he said. He took three paragraphs to state a policy that was currently in effect, and I abbreviated it for my own use, which said I can't change a published price without reviewing it with him in advance, but anything except that one case of changing a published price, I go ahead and administer it as my judgment dictates, maintaining this competitive posture.

[10,340] By Mr. DeLone:

Q. The memorandum says this confirms the existing corporate policy. For how long a period of time, to your knowledge, had this been the policy that Mr. Brown would have to give final approval to anything in published price?

A. Well, I can only speak back to mid-1965, because that is when I came to Buffalo, but it was all of that time, to my knowledge.

Q. In the period beginning in 1968, when you became Vice-President of Merchandising of the Building Products Division, what was the arrangement then, or how did this policy operate with reference to making a change in published prices?

A. Exactly as it is outlined here.

Q. Well——

A. I had——

Q. —Mr. Brown had to approve it, but how did it reach the stage of approval?

A. Well, I made recommendations as to what our policy should be when I received his concurrence as to a given published price change. I would go ahead and have the published

price change implemented. By that I mean mailed to the customers, and so on.

In actual—in practice, that was the only time he was really involved in it, was concurring with what the [10,341] recommendation was. It wasn't quite that simple, because occasionally he didn't concur with it.

Q. Then what happened?

A. Then we had lots of discussions about what our change ought to be or what the other influences are that we ought to consider, but ultimately I went back to the drawing board and reviewed it with my people and came up with a recommendation and ultimately we got it confirmed.

Q. Now, when you were mentioning earlier the fact you don't sell any more gypsum wallboard on the basis of price cutting, it is going to go into a house and if the house isn't going to be built, somebody isn't going to build it, even if they get the board free, I meant to ask you what is the net consequences to you when you reduce the price of gypsum wallboard?

A. It is just a loss of profit.

Q. You don't get additional business, but you get less profit?

A. That is right.

Q. Now, if you find, however, that there is a lower price which is being offered in the trade, then do you get any effect from lowering your price to the same level?

A. Well, hopefully we maintain our competitive position as far as that customer is concerned on the price side and continue to enjoy that particular portion of his [10,342] business that he chooses to give us.

Q. Now——

A. We hope we have other things, other types of things to offer him in the way of service and advice and counsel and selling help and so on that will induce him to buy from us as long as all things are equal, meaning the price being equal.

Q. Now you indicated that since you became Vice-President of Merchandising in 1968 all published price changes in accordance with this memorandum, NG 384, had the final approval of Mr. Brown—and, of course, my ground rule I mentioned before, we are not talking about anything after December 27, 1973—they have been approved by him, that is published price changes, but formulated, initiated by you?

A. I think concurrence would be a better word to use in approval, because in most cases that is what it was. They may be synonyms. I don't know. They may mean the same thing, but in most cases, it was a matter of receiving concurrence of what our recommended action was.

Q. With whom did you confer? And I am now directing my attention to from January, 1968, up as long as you were President of the Building Products Division, which was mid-1963, I think you said.

A. No, '68.

[10,343] Q. I am sorry.

A. To March of '73, yes.

Q. Did I say '63?

A. Yes.

Q. Thank you.

With whom did you confer in formulating your recommendations or reactions—you were reacting to someone else's published prices. Who in the organization were the people you used to help you formulate price change recommendations?

A. I conferred with, obviously, our Vice-President of Sales, who reported to my office when I was President of the Division, and also previously as Vice-President of Manufacturing. I conferred with our Vice-President of Sales, Administration, the man who is responsible for administering our price policies. I conferred with the Controller, because he would be able to have his people compute economic impacts of what we were thinking of doing.

I conferred with the Manufacturing Department occasionally, because if we were going to make a price change, announce it for a future date, they had to be alerted to make sure we had sufficient stocks to accommodate customers who wanted to buy prior to the price change.

Those were the main people I conferred with.

[10,344] By Mr. DeLoxe:

Q. You mentioned the vice president of sales. Who was that?

A. Mr. Jay Nicely.

Q. And the vice president of sales administration?

A. Mr. Ken Atwell.

Q. And have you described the consideration which you took into account in formulating your recommendations;

you have talked to the people you talked to; were there other factors which you considered in recommending a publication of either an increase or decrease in price, whether or not you were the first to announce, whether or not you were announcing after—

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[10,345] Q. Do you understand my question? I agree it is rather complex.

A. I think so.

Q. Go ahead and try, Mr. Hayes. If at anytime you don't understand, don't hesitate to let me know because I want to be sure you're answering responsively to my question.

A. I will.

There are a lot of considerations. This may sound like a long-winded discussion, but it is a complex subject.

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[10,346] The WITNESS. You have two main differences. One is the case when we are considering initiating a price increase or decrease, as the case may be.

Then you have the second side is when we are considering what action to take in response to an announcement that somebody else has published to the field.

Now, let's deal with the first one first. I guess perhaps that would be helpful. If we are considering initiating the action, whether it's a price increase or decrease, and I might say that this is something that we consider continually on a very regular basis. I don't mean every Friday morning, but it might be two times one week, and then skip two weeks or three weeks, but this is a subject that is constantly being reviewed. We review our cost price relationship. And if our costs are going up, this would signal that we need a price relief to maintain our margins. That is one. We consider the size or potential size or projected size of the marketplace. Are housing starts going up or are they coming down? We consider our costs on the labor increase side, the fuel increase side, all the elements of cost.

The Production Department at that point when we are getting increased costs, they are continually pushing up from the bottom saying, "You fellows have got to get [10,347] the price up because our margins are eroding and our costs are going up." We consider competitive activities and zones where we

have strength in the marketplace, and zones where we have weaknesses, where we are up against a competitor being right in that major market. There are many inputs that we consider in this, that is, when we are considering initiating a price increase.

In the case of a price decrease, that comes upon us because we have got a whole maze of reports from the field coming in. And I might say that I am talking now only about published price increases and decreases. And in the case of the decrease, we have only had one published across the board decrease in the last ten years. We had several cases where we republished our prices which may have turned out to be at a lower list than the previous one. But similar considerations were taken into consideration, the competitive nature of the market in certain zones.

Now, when we are talking about the other area, and that is the area where a competitor, one of the twelve, I guess, or thirteen, has made a price announcement to the field, published something, now the first thing we have to do is analyze what he said which means we have to plot everything on maps to find out what he has published to the customers. And then when we do that, we are in a [10,348] position to start deciding which alternatives we have. And there are four or five alternatives that we have open to us at that time.

Q. Now, if you announce an increase, and other competitors don't, what do you do then?

A. Well, if you announce a price increase and nobody else does anything, it is pretty obvious that you don't put it into effect. You have to defer it. And defer is probably a too gentile a word at that point because you just kind of scrap it if nobody else has increased. If you announce a price increase and others have published price increases subsequent to yours, well then as the one who has taken the initiative you are obligated to sit with your published prices at that time for a period of time, ten days, two weeks, whatever, to measure the impact and see if it went into effect or didn't.

Q. What do you mean you are obligated?

A. Well, if you don't follow your own price increase, there is no price increase. So you have to follow your own and sit and wait to find out if anybody followed it. You have to follow what you published.

And so you are in jeopardy at that point because you can lose your business during that time period when you are evaluating whether if somebody followed or not.

Q. Now, you indicated that in the situation where [10,349] a competitor has made an announcement of a published price change, you would gather information about just what it was that he announced. Where would you gather the information?

A. We would have our salesmen gather that information from customers throughout the country.

Q. Why do customers give you—you have been yourself a salesman. You have dealt with customers. Why do customers give you information as far as you know, why do they give you information about what your competitors have announced?

A. Well, the first reason, it is in their own self-interest. Most customers and especially the volume customers want to buy from multiple sources of supply. That protects them from a service point of view and that protects them in times of work stoppages, shortages, by any given manufacturer and so on. But they don't want to pay more than the lowest possible price. And the only way they can make those two things compatible is to tell their sources of supply what price they have available so that they cannot only preserve the lowest possible price, but they can preserve the multiple sources of supply.

Q. Now, why would they tell you if your competitor has increased, announced an increase? How does that——

[10,350] A. Well, they would tell us if the competitor announced an increase the same way I have to presume they would tell the competitor if we announced one.

* * * * *

The WITNESS. O.K.

They would tell you what the competitor's increase move has been because now they, as businessmen, have to make a judgment on this new development in respect to their customers. They have to decide what price they are going to quote their customers for future dates and future deliveries if possible. They have to tell their customers, or they have to decide for themselves whether they want to buy increased supplies of the material involved before the effective date of the increase, and to what extent they want to stock up. There is a cost of them carrying inventory too, so they want to make a business judgment [10,351] based on the input that they have. So what they are really saying to us, if it is somebody else's increase, is, "What are you fellows going to do? Are you going to increase the price too?" because in their mind they have to make a judgment on what their action is going to be.

[10,352] By Mr. DELONE:

Q. And if you advise them that, yes, you are gonna increase the price to them, what is the consequence to that in terms of their business decision?

A. Well, if the increase is significant, and if it is in their best interest, why they buy in advance, they place orders for shipment before the effective date of the increase. Or, they try to get you to protect jobs or not go up in price, or delay the increase, and all sorts of other things.

Q. Now, in the situation where you mentioned before on occasions that you—if you announce a price increase first and other companies, your major competition, don't make announcements of a similar price increase, what do you do then? You said you had to stick with your price increase for a certain period of time as the announcer? I thought that's what you said.

A. Would you rephrase that one? I am not sure I understand you.

Q. If you announce a price increase—and I am talking just generally now, not with reference to any particular area. But, if you announce a price increase, and the competitors who sell under that in the same market do not similarly announce an increase, do not announce that they too are gonna sell at the price you have announced, [10,353] what do you do then?

* * * * *

The WITNESS. If no competitors announce after our announcement, we don't put the price increase into effect.

By Mr. DELONE:

Q. If they announce, but announce at a less increase than you, what do you do then?

A. Well, then we have to adjust our price to what they announce. It becomes a competitive price situation. And that's true with changes in zones also.

Q. Now, up to this point we have been discussing the manner of dealing with—manner of and factors relating to the dealing with published prices.

Now, the memorandum of Mr. Brown, which I called to your attention earlier, NG 384, also made reference to administrative decisions needed to accommodate a separate policy when applicable to maintain a completely competitive position.

A. Excuse me, I don't seem to have that one any more.

[10,354] It may not matter.

Q. Well, I don't think it is necessary to find it.

I am gonna turn to the subject of changes in price, where you don't make any change in your list, but you deviate from your list price to meet a situation reported to you from the field.

Did that require, during the period of time we have been talking about, did that require any approval from the Chairman of the Board, Mr. Brown?

A. No, sir.

Q. And you had, since you were Vice-President, Merchandising, in 1968, you had authority to deviate from list price to meet competitive situations; did you?

A. Yes, sir.

Q. And was that done on a situation-by-situation basis?

A. Yes, it was. And I also delegated that to others in the organization, so I was not directly involved in those decisions.

Q. And to whom did you delegate that authority to meet competitive prices, to deviate from your published price?

A. Well, depending on the time period from '68 through '73, it varied. But in the main it was to Mr. Nicely and Mr. Atwell, in their positions as Vice-President [10,355] of Sales, Vice-President of Sales Administration.

There was a time in one or two of those years, '68 or '69, where the authority within certain guidelines, limits, was delegated to field regional sales managers.

Q. Would you see if you have that in pack National Gypsum 385, Mr. Hayes?

A. Yes, sir.

• • • • •

Q. That's a March 19, 1968 letter from Mr. Atwell to Mr. Gustavus. Is that an illustration of delegation of this authority to meet competition, delegation to the field?

A. Well, this is a letter from Mr. Atwell to Mr. Nicely, but it concerns Mr. Gustavus.

Q. Right.

A. Yes. This is an example of delegation of authority to a regional—in this case, the Regional Vice-President [10,356] on the West Coast.

Q. That was Mr. Gustavus' job at that time?

A. Yes.

Q. And it authorized him within certain limits to, in four types of situations described in the document, to meet competition?

A. Yes, sir.

Q. Now that was, I noticed, in March of '68. Do you recall whether there was any at a later time in '68?

A. Later on that year we delegated similar authority with price guidelines to other regional sales managers.

Q. Now, this meeting of special prices—or competitive offers, I should say—and delegating it out to the field in 1968, was this something that you advocated?

A. Yes, sir, it was.

Q. Had there been authority in regional managers and regional vice-presidents, even Mr. Gustavus, in 1966 or '67 to make such deviations from your published prices?

A. No. Ah—we had gone through a period where our policy over the years had changed in this regard. 1965 we had—we were meeting competition with some field authorities.

1966 we decided to go a different way and not meet competitive situations.

In 1967, I believe toward the tail-end, we made [10,357] a couple of special exceptions.

I was one of the advocates of changing our policy in 1968 when I moved into that position, Vice-President of Merchandising Operations. It was part of my plan, and concurred with by the Chairman, that we would take a more aggressive selling approach. And, part of that more aggressive selling approach was the meeting of competitive situations and the granting of some of these authorities to others.

Q. Now, did you take any comparable action in the field of credit terms?

A. Yes. I took a similar action there because on occasion we had run into reports from the field that indicated that competition was using special credit terms, extended credit terms, various credit terms as a means of getting business. And I felt that the use of credit was just another competitive situation, and I wanted the competitive situation all in one place.

Now that—I must clarify—I didn't have credit extension authority; nor did I want it. I didn't think it was proper. I had only—I wanted only the authority to meet the competitive situations to credit-worthy accounts, and somebody else had to judge whether they were credit-worthy or not.

Q. When you say you didn't have credit authority, [10,358] you are talking about you didn't seek or obtain the authority to evaluate the credit worthiness of the customer?

A. That's correct. And——

Q. Go ahead, excuse me.

A. So I—so we implemented a program of—I discussed this first with the financial people and the credit people, and we agreed, we concurred in a program that we could recommend for decision by the Chairman that gave this authority for a meeting of competitive credit situations to the Vice-President of Merchandising Operations.

• • • • •

[10,359] Q. National Gypsum Exhibit 443, dated February 20, 1968.

> Gypsum Product Terms Policy.
>
> The authority for meeting competitive cash discount terms of sale on gypsum products for credit-worthy customers within the principles of our policy on Antitrust Law compliance is vested in the Vice President, Merchandising Operations.

And that is signed by various offices and approved by Mr. Brown.

[10,360] You were then the Vice President, Merchandising Operations; were you not?

A. That is correct.

Q. And did you, on occasion, after February 20, 1968, use the authority that was granted to you to meet competitive cash discount terms?

A. Yes, sir.

Q. And could you give us some indication of the frequency?

A. Well, at the outset, it was relatively rare, and I signed all of the approvals myself, but then, as time went on and the frequency increased, I did not sign them all myself, and I delegated that authority to the Vice President of Sales Administration, the same place—the same gentleman who had the authority for meeting other competitive situations, and—was that all of your question?

Q. My question was, if you could tell us approximately—you are now talking about situations, as I understand it, situations where a customer reported to you that he was getting special credit terms from a competitor and you authorized the meeting of that competition by according him special credit terms.

A. Yes, sir.

Q. And I asked you if you could give us some indication of the frequency with which such special credit terms [10,361] were accorded to your customers between 1968, the period we are talking about, and '73.

A. Yes. I had a compilation run on this, and it would be less than 200 and more than 100 each year for those four or five years, six years.

• • • • •

[10,365] Q. We have talked about published prices and also about authority to deviate from price.

From your experience, in the marketplace, is it the published price the customer usually pays?

A. No, sir.

Mr. FRICANO. Can we have a period of time, sir?

By Mr. DELONE:

Q. Let's take the period 1968 to 1973.

A. No, sir.

Q. In any period when you were in the sales department?

A. Oh, yes.

Q. There were times?

[10,366] A. Yes, and, as we got toward the end of that period, into the 1973 period, it was more prevalent that the customer paid the published price.

Q. Now, do you know what the published price was in Pittsburgh for half-inch wallboard in January of 1960?

A. Yes, sir.

Q. What was it?

A. It was $49.60, delivered.

Q. When you say "delivered," the pricing, at that time, was on——

A. The pricing——

Q. Go ahead.

A. The pricing was different, at that time. At that time, we were pricing on an f.o.b. plant plus equalized freight basis, and the price was made up of a $41.50 mill price, plus $8.60 of freight.

Q. And what was the price of half-inch wallboard in Pittsburgh in December of 1973, the delivered price?

A. $49.

Q. So it is 60 cents less than it was in 1960 for half-inch wallboard?

A. I think I made a mistake in quoting that freight. $8.10 was the freight. I think it was $41.50 and $8.10.

Q. So you end up with the $49.60 price?

A. Yes.

[10,367] By Mr. DeLoxe:

Q. And that is per thousand feet of wallboard, is that?

A. Yes.

Q. Thousand square feet?

A. Of half-inch wallboard.

Q. We have had, although it is not here,—there has been so many of their things moved in—we have had in the courtroom for some time a four and a half by eight feet piece of wallboard. I think it was Government Exhibit 1. How many four by eight sheets of wallboard are there in one thousand square feet?

A. Just over 31.

Q. That would work out, at the 1973 price in Pittsburgh, to be $1.50 a sheet?

A. Slightly over $1.50 a sheet.

Q. Delivered in Pittsburgh?

A. Delivered in Pittsburgh.

Q. Now, where you are not successul in achieving your list or your published list price, where there is a negotiation of the price, can you tell us what the factors are that lead to some price less than the one that you have published?

A. Well, obviously—we intend to sell at our published price anytime we can, and sometimes we can. We, [10,368] however, as we usually publish in our price bulletins, we reserve the right to meet competition, and where there is a competitive factor that becomes known to us with a reasonable degree of accuracy, why we now have the option of meeting it or not meeting it and if we chose to meet it, we sell at a lower price than our published list price.

Q. What kind of—who are the customers for this product with whom National deals chiefly?

A. Mostly lumber dealers and building supply dealers, some lesser numbers of specialty dealers and in certain regions contractors. We have numbers of, today, prefabricators, prefabricated housing manufacturers and also mobile home manufacturers.

Q. Your sales efforts since you have been head of merchandising in 1968, vice president in charge of merchandising and through the other jobs you have had up to 1973, has National endeavored to set up any distribution centers from which it sells directly to the customer, to the ultimate user?

A. No, we have set up distribution centers which we call warehouses or supply centers, but they are for the purpose of servicing the dealer, because we follow a concept of attempting to always be dealer—be a seller, selling organization. Our—I guess I can word it in a different way—our concept is a little bit different than [10,369] some of our competitors.

Q. In your—are the dealers with whom you negotiate sophisticated? Do they negotiate about the price they are going to pay for your product?

A. They do with some regularity, but they don't on every single order. They do with some regularity and they are sophisticated buyers. They know that the price of the product they are buying with great rapidity. Many of them buy several truckloads or carloads a day.

This is a fast-moving service operation where they can place an order as late as five o'clock in the evening and have the truckload at their door at seven o'clock in the morning. But they know the business and prices of the product for the most part.

Q. Now, in the—you have occasions when the customer tells you or indicates you have—they have been offered a lower price by the competitor?

A. Yes, sir.

Q. And that—Do you have a procedure to deal with that situation?

A. Yes, we do and it is handled by our field sales people and our district managers. It is called our request to meet competition procedure.

• • • • •

[10,370] By Mr. DeLone:

Q. Were you aware that—were you aware that at times in connection with that procedure you would—your price administration department would verify with a competitor whether a purported offer, purported to have been made by that competitor had been made?

A. Yes. I was aware that happened on occasion.

Q. When did you first become aware of that?

A. Well, I am not really sure, but I believe it was after I moved to Buffalo in 1965.

Q. And are you familiar with National Gypsum's a..titrust compliance policy, which in this record has been marked National Gypsum Exhibit 77?

A. Yes.

Q. And that policy which was promulgated—were you a recipient of it? It was promulgated——

A. Yes. I was.

Q. —in the end of 1967.

A. Yes.

Q. Was that authorized to permit the verification of prices with competitors?

A. Yes, it did, to certain authorized people.

[10,371] Q. Did there come a time when the practice of verification was stopped?

A. Yes, sir. It was stopped in the early part—I believe it was January of 1969.

Q. What happened then?

A. Well, we were advised by counsel that—outside counsel, that is—that there had been a recent decision of the Supreme Court which tended to indicate that in certain cases, at least in that particular case, that type of verification employed was considered illegal. And while we were trying to sort out exactly what that meant to us, we stopped all verification. And to my knowledge, we did not resume it.

• • • • •

[10,373] Q. Mr. Hayes, prior to the recess you indicated that you learned of some verification, as we have described it, when you came to Buffalo in 1965. And you have also indicated that in January of 1969, on advise of counsel, verification was stopped. Who was authorized so far as you know to call competitors to check on the truth or the accuracy of reports of a better offer from competition?

A. The only ones I am aware of were Mr. Atwell, who was our vice president of sales administration, and our general credit manager in cases of credit.

Q. What was his name?

A. His name was Barber, Robert Barber.

Q. He is no longer living, is he?

A. No.

Q. And do you know whether any persons other than Mr. Barber and Mr. Atwell did in fact make verification calls to this period from 1965 to——

A. I subsequently learned——

Q. —1969?

A. —that Mr. Earl Kroth, who was Mr. Atwell's [10,374] assistant, had made verification calls.

Q. When did you learn that?

A. Well, it was some time during the preparation for this trial, I guess, subsequently.

Q. All right. But subsequent to 1969?

A. Yes.

Q. Now, you knew the practice was going on yourself?

A. Yes.

Q. And as far as you were concerned, what was the reason for verifying?

A. Well, the main reason was that—there were two reasons. One was to avoid conflict with the Robinson-Patman Act, which we were very conscious about a violation of the Robinson-Patman Act which was price discriminating which would have been involved if we were discriminating in price among our customers in the same competing area. And the second reason was that on some occasions our customers didn't tell us the truth, and we were attempting to find out what actually was the truth.

Q. Now, in his period in 1968, from February, I think it was, when you were authorized to meet competitive situations, did you verify with competitors in every instance when you had a report up from the field?

A. You mean me?

[10,375] Q. You or persons working under you whom you authorized?

A. No, I did not. And, certainly, not in every instance. That was a relatively rare thing.

Q. And in what situations, so far as you know, were verification calls made; when, or what reason, what infrequent occasions? You indicated it wasn't always done. Why was it done sometimes and not others?

A. Well, you have a circumstance where something entirely new and different hits you that you have not had reported from the field before and which you do not have documentary evidence of. And, on occasion, as I mentioned, where there is reason to believe that the customer may not be telling the truth.

Q. And were you aware that persons in your company responded to similar calls from your competitors in this period from 1965 to 1969?

A. Yes, I was.

Q. Did you make any vertification calls yourself?

A. No.

Q. Do you have there Government Exhibit 25?

A. Yes, I do.

Q. That is a document that is already in evidence, dated December 12, 1969, from Mr. Atwell to you and to Mr. Nicely.

And in it he refers to the fact that as a [10,376] result of advice of counsel he had stopped—no verification had been made after some time in January of 1969. The letter though is dated December 12, 1969.

A. Yes, sir.

Q. Did you receive that letter?

A. Yes, I did.

Q. Did you take any action as a result of it?

A. Yes. I suggested to the people that issued our policies and our general policy book that the section on antitrust compliance should be updated to include our January decision.

Q. Your January, 1969, decision?

A. Yes.

Q. And was your updating suggestion carried out?

A. Yes, it was. The "8" page was changed in the antitrust compliance policy. That removed the authority for vertification.

Q. Now, I want to turn to certain particular changes in published price, Mr. Hayes, in which you had some involvement.

First I would like to go to the period back in December of 1965. That is the time when you were manager of the Central Region I think you called it?

A. Yes.

Q. But you were physically located in Buffalo; is that [10,377] correct?

A. In December of 1965, yes, sir.

[10,378] By Mr. DeLone:

Q. All right.

And, in fact, I should say in November as well.

A. November.

Q. Do you recall an occasion when you received a telephone call about a price announcement the United States Gypsum Company had made?

A. Yes, sir.

Q. And from whom did you receive such a call?

A. I received a call from Mr. William Wright, who was our Division Manager, headquartered at our Chicago Office.

Q. Was Mr. Wright your—were you his immediate superior?

A. Yes. His division reported to my office.

Q. And what were you told by Mr. Wright?

A. Mr. Wright told me that he had in his possession, he had received from a customer a document which indicated that United States Gypsum Company was announcing a price increase, and that he also had a United States Gypsum Company internal document.

Q. What did you do about this call?

A. I told him to dictate the price announcement to my secretary, and when I was—And that was all I told him.

[10,379] So, I put my secretary on the wire and he dictated to her.

Q. Do you have there National Gypsum Exhibit 387?

A. Yes, I do.

Q. can you tell us, without giving us the details of it, what that document is? It is a document of some 1, 2, 3, 4 pages.

A. Yes. It is the typed-up letter that was dictated by Mr. Wright over the telephone to my secretary.

Q. Who was your secretary at this time in 1965?

A. Miss Ruth Doherty.

Q. Are you able to fix the date of the telephone call that you had from Mr. Wright, the date when he dictated this material to your secretary, Miss Doherty, Or, Miss Doherty.

A. It was on the morning of November 17th.

Q. How do you know that?

A. Well, I recall that it was—It caught my eye that the—after this thing was dictated and I looked at it, that the letter which was dictated over the phone that day was dated November 17, the same day.

Mr. DeLone. I offer in evidence National Gypsum Exhibit 387.

Mr. Fricano. May we have an identification of the handwriting on the lower right-hand corner of [10,380] the first page and the numbers which have been written in on succeeding pages.

Mr. DeLone. All right.

I should say that I'd like an opportunity—There is some marking which is extraneous in the extreme lower right-hand corner which should have been——

Mr. Fricano. I do not need Mr. DeLone to read me that writing. I know what that is. I need the other writing.

Mr. DeLone. All right.

I will say that I will have this copy corrected to eliminate writing which should not have been left on, according to our previous understanding with the Court, which is what is in the lower right-hand corner.

The other writing, the "Reported by Bill Wright," is the writing you are referring to, Mr. Fricano?

Mr. Fricano. Yes, it is.

If Your Honor please——

Mr. DeLone. Are you satisfied to have me tell you what it is, or do you want the witness to identify it? You asked to have it identified.

Mr. Fricano. If Mr. DeLone will represent, I will accept his representation on this point.

Mr. DeLone. That's in Mr. Atwell's handwriting.

[10,381] The Court. All right.

Mr. DeLone. And the figures, the pencil figure—I guess they are pencil. I don't have the original. But, they are figures written in on the second and third page of the document, written in by Mr. Webster. Mr. Webster, who has also testified heretofore.

The Court. All right.

Are you satisfied, Mr. Fricano?

Mr. Fricano. Yes, I am, Your Honor.

The Court. Any objection to the exhibit?

Mr. Fricano. No, Your Honor.

The Court. All right, it is admitted.

[Defendant National Gypsum Exhibit No. 387 was received in evidence.]

By Mr. DeLone:

Q. Now, after you got this typing that your secretary had made up from the basis of the dictation that Mr. Wright had given to her, what did you do with it?

A. I took it to Mr. Atwell's office and gave it to him.

Q. And were you further involved at that time in what steps were taken in reference to this matter at National [10,382] Gypsum?

A. No, I was not.

• • • • •

Q. Do you have Government Exhibit 301 there, Mr. Hayes?

A. Yes, sir.

Q. A document entitled "Plan of Action."
A. Yes, sir.
Q. And the other two documents, 500 and 502 are also so labelled?
A. Yes.
Q. Were you involved in the preparation of any of these three documents?
A. No, sir.
Q. Do you know who did prepare them?

[10,383] A. No. I subsequently have learned, many years later, but I did not know at that time.
Q. All right.
And the document which is marked GX 501, do you have any way of determining who typed that document?
A. Well, yes. That's typed in a particular, in an unusual style, and there was only one girl in our office that uses that style.
Q. And who is that?
A. Her name is Ruth Anderson. And the reason I know it is because some years afterwards she was my secretary.
Q. And that back in 1965, in November, whose secretary was she?
A. She was secretary to Mr. Manske, who was the President of the corporation at the time.
Q. And the phrase "Plan of Action", you said you had nothing to do with the development of this plan of action which is shown on 501, 500, and 502?
A. No.
Q. But is the phrase one that is familiar to you?
A. Yes.
The COURT. May I see that exhibit just a minute? I want to see what that typing is.
Mr. FRICANO. I have a clearer copy, Your Honor.

[10,384] The WITNESS. If I may, Your Honor. It is the use of the lines all through it. Later on I . . .
The COURT. Oh, yes, I see what you mean.
The WITNESS. Later on when she was my secretary I went crazy trying to get her to stop using those lines.

Mr. DELONE. If I might just show the jury my copy to see what we are talking about. I think they can see it from where they are.
The COURT. It is the lines between the paragraphs that you are talking about.
Mr. DELONE. I don't have the big blow-up here.
The COURT. That's what you are talking about, the lines between the paragraphs?
The WITNESS. Yes.
Mr. DELONE. I don't know that the last question has been answered. I wonder if you might read that back.
[Last two questions and answers read.]

By Mr. DELONE:

Q. How did it become familiar to you?
A. Well, it is a phrase that we use. I use it myself in normal planning sessions quite often. But it was [10,385] a Manske, a Mr. Manske phrase. He used that phrase with practically everything he did.
He had an old lecture that he used to give us that started with plan, organize, delegate, coordinate, and control, and everything started with a plan of action.

[10,386] By Mr. DELONE:

Q. Now, did you, sometime subsequent to the 17th of November, 1965, receive from Mr. Wright the document which has already been marked in evidence as Government Exhibit 520?
Mr. DELONE. And, Mr. Grainer, might we have 520?
The WITNESS. Yes, sir; I did.

By Mr. DELONE:

Q. That document, of some four pages, is, in the first page, a United States Gypsum announcement to its customers; on the second page, a listing of the zones which the announcement was applicable, and those—an indication that, in all other zones, the prices were unchanged; and then a document to all dealer sales personnel from a Mr. J. P. O'Brien.
Is that what you referred to earlier as an internal USG document?
A. Yes, sir.

Q. And the last page is a—is simply the envelope directed to you, airmail special delivery, and postmarked in Chicago, May—I am sorry—November 18, is that right, 1965?

A. Yes.

Mr. FRICANO. Would Mr. DeLone please read, also, the time of day whether it was A.M. or P.M.?

[10,387] Mr. DELONE. The postmark, as I read it, just says November 18, P.M., with no time on it.

* * * * *

[10,388] Q. I meant to ask you, Mr. Hayes, the time you received Mr. Wright's telephone call on November 17, were you aware or did you have any knowledge prior to receipt of his call of the announcement that USG had put out in the field [10,389] about a price move that it was making?

A. No, sir.

Q. The three documents, 399, 383, and 398, which I just had placed before you and which have been offered in evidence, all deal with other instances when Material Service and Mr. McDermot of that company had discussions with Mr. Wright or someone else in National Gypsum about United States Gypsum?

Mr. FRICANO. Well, if Your Honor please, I object, unless it is more specific. The question, coming after the breath of——

Mr. DELONE. I was trying to save time, but we can take them one by one.

399. I guess the simplest thing, on that—it is short—from a Mr. Boy to a Mr Atwell:

> Dear Ken:
>
> You asked three specific—dated March 29, 1967.
>
> You asked three specific questions regarding one of our competitors and their activity in the Chicago market. I have no account that would fall in any one of three categories. I do, however, have one account that I believe should be mentioned. This would be Material Service. Bestwall presently serves the lion's share of this account's business, [10,390] where it used to be split fairly evenly between USG and ourselves, with Bestwall taking a minor percentage. During the last two years, we have seen Bestwall emerge as their major supplier, forcing ourselves and USG to fight over the remaining crumbs.
>
> This would be the only yard where this situation exists. I hope it is of interest to you.
>
> Regards, C. A. Boy.

And then it is written, "How?"

By Mr. DELONE:

Q. Who is C. A. Boy?

A. He was the district manager at Chicago.

Q. And a copy of this went to Mr. Wright, who, at this time, was made Western Division manager?

A. That is correct.

Q. He was Mr. Boy's superior?

A. Right. That's right.

Q. And National Gypsum 383—perhaps I can just read part of that. That is a memorandum from Mr. Wright to W. W. Gerber, dated February 1, 1968.

Who is W. W. Gerber?

A. Mr. Gerber was Mr. Wright's superior at that time, headquartered in Buffalo?

Q. And the subject of this is Material Service [10,391] Corporation, the same outfit we have been talking about?

A. Yes, sir.

Q. And it says, in part—I would be glad to read any other parts that you would like, Mr. Fricano—

> On January 24, 1968, Robert McDermot, Manager, General Sales, for Material Service Corporation——

A. Excuse me. That is "Manager, Gypsum——"

Q. "Manager, Gypsum Sales——" excuse me—

> for Material Service Corporation, called me at home and indicated that he wanted to see me. I set up a breakfast appointment with him for the following morning at Howard Johnson's, Des Plaines, Illinois——"
>
> I may not have that pronounced right—
>
> At this meeting on January 25, 1968, he stated that USG had given them a price discount of five percent off their published prices in effect at this time on board

machine products. He asked what our position would be in regard to this matter. I had no answer for this.

• • • • •

[10,393] By Mr. DeLone:

Q. National Gypsum 398, memorandum dated 12-11-69 is so short I think it is easier to read it than—

For the file:
From R. A. Elberson.

Who is R. A. Elberson?

A. He had a clerical position in the price administration department.

Q.

Received phone call from Bill Wright this afternoon. He advised that he had lunch on 12-11-69 with a Mr. McDermitt of Material Service Company. McDermitt told him that he has been advised by USG that they are going to put out a new announcement on gypsum price, reevaluating their previous announcement. McDermitt told Bill Wright that this would probably represent a decrease of what they have previously published.

R. A. Elberson.

• • • • •

[10,402] Q. Now, turning to the period when you were assistant to Mr. Colon Brown, which I think you indicated began in early 1967——

A. Right.

Q. —and continued until January, '68, when you became Vice President of Merchandising for the division, you described, in a general way, yesterday, your functions, which were to be involved in anything that Mr. Brown was involved in, where he asked you to become involved. Is that a fair summary?

A. Yes.

Q. Now, did you, in that position, become involved with a possible price move by National Gypsum in May of 1967?

A. Yes, sir.

Q. Would you tell us what your involvement was and [10,403] what the conditions were, which were under consideration in May of—with reference to this move that was made, as is already evidenced in the record, as evidence of the move that was made in 1967?

A. Well, I have to look a little bit at the background. I guess we had gone through that period where we had chosen to meet competition on a very broad basis in 1964, 1965; and in 1966, we had elected not to do that.

Now, we, at that point, had tried to maintain our business on a published price basis, and we had, in fact, done that. However, by late 1966 and into 1967, there is evidence that we were rapidly losing position in the marketplace. Our market penetration was going down, and in fact, it reached, I guess, an all time low in October of '67, but, of course, we didn't learn about that—in October of '66, but we didn't learn about that till the information was available, until the first part of '67 or the tail end of '66, and so, now, the question was, should we change our posture of not meeting competition, of choosing not to meet competition.

Q. Now, you made reference to your market share or market pentration in various months. Do you have or—

• • • • •

[10,404] Q. What is National Gypsum Exhibit 400, Mr. Hayes?

A. It is a listing of monthly market penetration from June of 1966, by months, to February of 1967.

• • • • •

[10,405] Q. This information, monthly market penetration information, how is that assembled, Mr. Hayes?

A. Well, I believe I mentioned that yesterday. Each reporting company in the gypsum industry sends its own monthly sales figures to an independent accounting firm of Peat, Marwick & Mitchell.

Q. That's the same process you described yesterday?

A. Same process, yes, sir.

Q. Very well.

So you were able, with the reports you got back from the accounting firm, to determine your . . .

Q. But not October of '66?

A. No, that's correct.

Q. And the lowest figure of this set is February, 22.6 percent market penetration in 1967?

A. That's correct.

Q. Now, when was that figure available to you?

A. That would be available the latter part of April.

Q. Now, you were describing the significance of this loss or decrease in market penetration in relation to—that was taken by National Gypsum is May of 1967?

A. That's correct.

Q. Would you describe what other information was available to you and considered in discussions in which you were involved at that time, leading to the action taken [10,408] by National Gypsum in May of 1967?

A. Well, market penetration was one of the things that we now knew at that first part of May.

We also knew what our shipping figures were in terms of footages. And our sales in terms of footages had dropped drastically from the previous year's comparable month, which is something we look at quite closely. That takes the seasonality out of it if you look at the same month in two different years.

Q. Which month was this where your shipments had dropped drastically?

A. In March and April.

Q. That's something in addition to the data you had on your February market penetration?

A. Yes. As a matter of fact, as I recall, there was about a 50-percent drop in sales volume from the one month of one year to the same month of 1967. So, this is cause for alarm, obviously.

Q. Now, who was involved in the consideration of this problem—assuming that, if you do have it correct, you were one of them?

A. Well, now, I think we ought to make that clear. My involvement there was not one of direct authority, because I didn't have direct authority at that time.

I was serving as assistant to the Chairman.

[10,409] The people who were involved were Mr. Nicely, Mr. Duncan, Mr. Atwell, Mr. Brown—obviously. He was the person in a responsible position at that time—still is. But he was at that time for this particular section of the business.

A. We were able to compute our own penetration from the reports, the totals that they gave us.

Q. But I believe you indicated that there is about a 2-month time lag because you report in how much you have sold, and then the accountants accumulate everybody's totals and tell you what the total sales of all the industry were?

A. That's correct.

Q. They don't tell you anything about anybody else's sales, just the total, so you can measure yourself against the total?

A. That's correct. We know nothing about the other fellow's penetration.

[10,406] Q. And this exhibit indicates—And this was drawn from regular reports of your company; was it not?

A. Yes.

Q. That the figures went as follows for your National Gypsum's market penetration:

June, 1966, 26 percent; July, 1966, 24 percent; August, 24.9; September, 23.7; October, 23.6; November, 24.0; December, 23.7; January, 22.8; February, 22.6.

So that you were down more than 3½ percentage points in your percent of total market by February of 1967, as compared to June of '66?

A. That's correct.

Q. Now, when we say you were down that much, that's in your share of the total market. What does that mean in terms of just National Gypsum? How much of your business have you lost expressed in a percentage if your share of the total market has gone down more than 3½ percent?

A. Well, 3½ percent on 26 percent of the industry is roughly 13 to 14 percent drop in penetration.

[10,407] Q. And, in other words, your sales of the total, measured by National Gypsum's performance alone, have dropped 13 or 14 percent?

A. That's correct.

Q. Now, you said—I thought—in answer to an earlier question, that October was the low month?

A. Yes. I am sorry, I misstated that. It was a different October that I had fixed in my mind that that happened. It was October of 19—Well, I don't remember at the moment. It will come to me.

Q. All right.

Now, did you have available to you this group of people you have described—Did you have available to you information about not just statistics like those we have referred to of your sales volume and your market percentage, but did you have available to you information reported up from the field about competition that was being encountered?

A. Yes, sir. We had been receiving regularly our normal information and special information from the field from customers, as reported by our sales force, about our competitors' activities. And this included widespread discounting of prices from published list.

Q. Were there any particular competitors singled out?

A. Well, the major competitor that was reported was Georgia-Pacific. Secondarily—oh, no, I shouldn't say that. I don't know that for sure.

Q. What had you learned from your field intelligence—if we may refer to it as that—about Georgia-Pacific [10,410] and its selling methods?

A. Well, they had a widespread number of distribution centers and warehouses, and that our field people reported that the individual, that in their opinion the individual managers of these warehouses could do substantially anything they wanted to move the merchandise. And, that it was not necessarily sold in normal truckload-carload quantities. Sometimes it was top-loaded with plywood tied to special pricing on plywood and handled in different manners.

And it was—well, it was more than a brush fire. It was coming in all directions. It was a pretty full-scale warfare sort of thing.

[10,411] By Mr. DeLone:

Q. Now, were all of these factors that you have previously described, that is, your drop in market penetration, your sales way off as compared with the previous year, the reports you were getting about competitive discounting, were all of these matters considered and discussed in meetings which you attended up to the action which National Gypsum took in May of 1967?

A. Yes, we met several times, and we put into the hopper, so to speak, every bit of information that anyone had collected for discussion.

Q. And these were internal meetings of the people you have already described?

A. Yes, sir.

Q. And did you consider the various alternatives open to you?

A. Yes, we did.

Q. And what was decided?

A. The decision was that we should cut the price across the board, nationwide, and that we should publicize this action.

Q. And whose decision was that?

A. Well, the utimate decision lies with Mr. Brown.

Q. And did you cut the price?

A. Yes, we did on May 15, effective May 15, 1967.

* * * * *

[10,414] By Mr. DeLone:

National Gypsum 388 is a press reelase, and it says at the top, "Refer to J. P. Hayes," and it is dated just 5/67. It is No. 307-5-67, but the date line says Buffalo—well, then it says Buffalo, New York, effective May 15, and it goes on with the press release.

* * * * *

[10,415] Mr. DeLone: * * * The press release reads:

National Gypsum Reduces Prices.

[10,416] Buffalo, New York. Effective May 15, the prices of gypsum sheathing and cream-faced gypsum wallboard sold to dealer outlets are reduced by $2 per thousand square feet on one-half inch basis.

This action was taken to meet price discounts and other inducements believed to have been made by competition to selected accounts on an individual basis.

To provide an equitable competitive position for its customers and to avoid possible illegal price discrimination, this large producer chose to reduce their published prices nationwide in preference to meeting specific situations.

A company spokesman said, 'This action is consistent with our policy of fully protecting and maintaining our position in the marketplace.' He added, 'continually

rising costs are expected to result in rising prices for gypsum products later in the year.'

By Mr. DeLoxe:

Q. Were you at this time, in May of 1967, Mr. Hayes, were you involved and concerned on a regular basis with the costs which National Gypsum was experiencing?

A. Yes, we had—well, we had two conflicting problems here. One was our costs were increasing, and [10,417] we were losing our business because of what we felt to be was price competition in the field. And as our costs were increasing, we weren't able to get what we thought was the proper cost-price relationship, and our selling price—we weren't able to increase our selling price. So we had a third influence that came in too, which we have mentioned here, and that was we were very desirous of selling at our published prices. This had been our game plan. And we were very conscious of the Robinson-Patman Act, and that influence was that we didn't want to be involved in anything that could be price discrimination among our customers or could appear to be price discrimination. So all of these conflicting influences were part of the inputs that went into this decision.

* * * * *

[10,418] Q. Now, the press release indicated or included a prediction that because of rising costs the prices might go up later in the year.

A. Yes, sir.

Q. Do you recall that there was a price increase announced by National effective October 1, 1967?

A. Yes, sir.

Q. In the East?

A. Yes.

* * * * *

Q. While Mr. Grainer is getting the balance, do you have 401 before you there, Mr. Hayes?

A. Yes, I do.

Q. That is—what is that document?

A. I must have covered up my glasses.

This is a letter from one of the men in the Sales Administration Department that went to the entire dealer sales

force with a copy to our gypsum plants. It is [10,419] an internal inter-office memo.

Q. And——

A. And it relates to gypsum prices.

Q. It reads in part,

> Today we mailed price bulletins to your dealer accounts announcing an increase in the prices of some gypsum products. These adjustments are in the range of approximately 4½ percent to 8½ percent, and become effective"—

If I didn't give the date, it is July 21, 1967.

> —and become effective with all shipments made on and after September 18, 1967. These are due to increased costs of labor, raw materials and equipment as stated in the attached bulletin.
>
> In most areas the increased prices restore gypsum prices to the level at which these products were sold in 1963. This of course means that increased operating costs and cost of materials and equipment since 1963 is being absorbed by us.
>
> We would also like to call your attention that if we consider the restoration of the $2.00 decrease on a one-half inch basis, made by us on May 15, 1967, we are only increasing prices about one half of the percentages mentioned above.
>
> If you have been selling in your present [10,420] area for any length of time, you will also recognize that the 1963 prices in many cases were lower than those in effect late in 1961 and 1962.

Then the document indicates for half-inch wallboard an increase is $3.75.

Now was that increase announced July 21st?

If you look at Government Exhibit 2132, I think you will see——

A. Yes, in the price bulletin for July 21, as the date of the announcement, and the effective date of the increase would be September 18, 1967.

Q. Was that an increase for the entire United States?

A. I believe it was, yes.

Q. And do you recall, were you the first to announce that increase? Was National Gypsum?

A. Yes.

Q. Did you announce it?

A. Yes, we were.

Q. Do you remember what the response, the competitive response was? What did the competitors do about the announcement you made?

And I call your attention in that connection to Government Exhibit 2130 and 2133.

A. Well, when we made this announcement, the—[10,421] and put it into the field, the competitors did not go along with it precisely. There were extensions of changes in the dates. There were changes in amounts and the West Coast did not go in at all and certain parts of the middle part of the United States did not go in.

Q. If you look at Government Exhibit 2132—I am sorry—2133, that is the United States Gypsum announcement of August 4, 196——

A. No, no, 2133?

Q. I am sorry, 2130.

A. 2130, yes.

Q. That is a U.S.G. announcement of August 4, 1967?

A. Yes.

Q. Which announces revised prices effective October 1, 1967. Your date, effective date, had been September 18, hadn't it?

A. That is correct.

Q. Does that mean that you proposed—you postponed your increase until the effective date—until October 1?

A. Yes, we did.

Q. And if you will look at Government Exhibit 2133, that is a National Gypsum price bulletin of December 8, 1967, directed to your customers in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

[10,422] **It says,**

> **On July 21, 1967, we announced a price increase on gypsum products to be effective September 18, 1967.**

That is the announcement we have been talking about?

A. Yes.

Q. And it goes on:

> To be competitive, this increase was deferred to October 1, 1967 and subsequently postponed to January 1, 1968.

Now is that what you were referring to about it not becoming effective in the western part of the United States?

A. Yes, sir. When other manufacturers did not see fit to follow our price increase notice any way at all, we obviously could not put it into effect.

Q. And you—why not?

A. We would have lost our business completely. We couldn't sell at a higher price than the other manufacturers in those 11 western states.

Q. What was the price increase which you finally did announce on December 8, effective December 8, 1967—effective January 8, 1968, for the western states, as shown by Exhibit 2133?

[10,423] A. On half-inch wallboard?

Q. Yes.

A. It was $2.25 versus the original $3.75 we announced.

* * * * * *

[10,424] Q. * * * Mr. Hayes, we have covered the fact that, in May of 1967, National initiated a $2 decrease across the nation, [10,425] and, in September—in July of '67, to be effective September 18, you announced an increase of—on half-inch wallboard, $3.75, and that, as to the Western United States, that did not become effective until January of 1968, and then only at $2.25 on the half-inch wallboard.

A. Yes.

Q. Now, would you look at—with reference to any price action taken by National Gypsum in 1968, would you—and I am dealing, now, with major published price moves—would you look at National Gypsum Exhibit 432?

A. Yes.

Q. That is a memorandum which you prepared?

A. Yes, I did.

Q. Subject—it says, "Meeting, May 23, 1968." Is it your practice, when you have a meeting such as this, to write a memorandum?

A. Yes, sir.

Q. Now, at the time of the meeting, or shortly thereafter?

A. Shortly thereafter, and, usually, I write it from notes I make during the meeting.

Q. This indicates, At a meeting on May 23, 1968, for gypsum price increase discussion with J. P. Hayes, J. P. Nicely, J. W. Duncan, K. H. Atwell. Who is J. W. Duncan? You have mentioned him before, and I don't know that he has been [10,426] identified.

A. He was vice president, and he had a sales responsibility that included gypsum products. That was primarily the industrial side.

* * * * *

Q. Your memorandum reads:

> We will prepare a price increase notice on gypsum products, to be dated June 1, 1968, effective August 1, 1968. Price increases will be $2.00, $2.50, or $3.00, on one-half-inch or three-eighths-inch basis, and $2.50, $3.00, and $3.50 for five-eighths-inch, by zone, as determined as th result of a comprehensive study of the approximately 45 zones presently outlined.

What are you talking about, these zones that are mentioned in here, Mr. Hayes?

A. Well, there were a broad number of different pricing zones throughout the United States, geographical subdivisions.

[10,427] Q. Now, do you have before you National Gypsum Exhibit 433?

A. Yes.

Q. National Gypsum 433 is a National Gypsum price bulletin. Do you see that?

A. Yes.

Q. That particular bulletin pertains to Allegheny and other counties, Pennsylvania, dated June 1, 1968, and indicating an effective date of increased prices of August 1, 1968.

A. Yes.

Q. Now, your memorandum of May 23 said:

with reference to proposed price increases,

> This will apply to all states in Continental United States except California, Western Nevada, and Arizona areas normally considered California pricing area.

Do you recall whether, in 1968, you announced a price increase on June 1 for any area except that east of the Rockies?

A. In 1968?

Q. Yes.

A. No. I believe it was just east of the Rockies.

Q. And did you initiate that price announcement? Was National Gypsum the company that made the announcement?

[10,428] A. We made this announcement; yes.

Q. And no other competitor had made a similar announcement prior to yourself; is that correct?

A. No.

* * * * *

Q. 525, Mr. Hayes—well, let me ask you what, if anything, is the relationship between these documents, Government Exhibits 525, 524, and 526?

A. Well, 524 and 526 are internal memos that relate alternates, plans of action on our part in regard to the west coast, and the 525 is just a previous memo to Mr. Brown, indicating that this is our recommended plan of action, and that this is for his review, which was in accordance with our policy on published prices. If I was going to recommend or make a change, I submitted it for his review and concurrence.

[10,429] Q. So 525 is dated June 10th, and that is the transmittal to Mr. Brown of the documents which are 524 and 526?

A. I believe so.

Q. Now, looking at 524, the plan of action that you—525, you say, "Mr. C. Brown: For your review. This is our plan of action."

That is June 10, 1968, and then the enclosed plan of action, West Coast Gypsum Policy, reads, in part:

> "We plan to immediately restate our policy and present published book prices into eighteen and a half states in the western region.

A. Eight and a half.

* * * * *

Q.

> We plan to immediately restate our policy and present published book prices into eight and a half states in the western region.

A. This would include a statement on our [10,430] policy of being competitive in the past and present time.

Now, what do you mean, restate your present published prices in those eight and a half western states?

A. Well, the actual selling prices in those states, at that time, were considerably below our published list prices, and that we would expect to sell at those prices, and it had the same effect of trying to increase back to what our published list was.

[10,431] By Mr. DeLone:

Q. In paragraph number two there is some reference to the states of Colorado, New Mexico, ten counties in Wyoming, and the counties of El Paso, Hudspeth, Culberson, Texas.

What were you proposing to do? What was your plan of action as to those areas?

A. Well, we hadn't made any announcements in there. As I recall, some other manufacturer had intervened and made some announcements concerning those states, and so we planned to announce an increase.

Q. And Government Exhibit 526—which was part also of this transmittal to Mr. Brown—indicates West Coast—and this is a June 10, 1968 transmittal—West Coast Prices. Alternatives Considered in West Coast Price Announcement:

1. Meet Kaiser's published announcement.
2. Meet U.S.G. published price announcement.
3. Announce independent price schedule of our own.
4. Do nothing.
5. Restate present published prices and policies with statement of our intention to be competitive.

Is that what you ended doing?

A. Yes. That was the recommended decision. And, [10,432] as you saw from the other document, that is what we did.

These were the alternatives we studied, and I was merely briefing Mr. Brown of the thought process that resulted from our series of meetings to arrive at our decision, which was our recommendation.

Q. The original announcement that you had made in the area east of the Rockies was made on June 1st with an

effective date August 1, 1968; was it not, Mr. Hayes? As you will see from National Gypsum 433.

A. Yes.

Q. And now, would you look at National Gypsum 437 and tell us whether you, your increase was effective August 1, 1968?

A. No, it was not.

Q. What happened?

A. Well, other manufacturers—May I read this?

Q. Yes. Well, don't read the whole document, but if there is a piece there that will help.

A. In the second paragraph it states—and this is a letter to our customers in the east of the Rockies area——

It states:

> To meet the prices and terms of sales, terms of sales subsequently announced by other manufacturers, we are revising our prices and terms as follows to be competitive effective with shipment made on and [10,433] after September 16.

So that other, after our announcement, other manufacturers had come out with various announcements and changes and different terms of sales and prices, and we found it necessary to make a completely new price bulletin and send it out to the field.

Q. And if you will look at National Gypsum 433, the bulletin dated June 1, 1968, for a price effective August 1, 1968, you will see that the half-inch wallboard price published at that time for Allegheny County was $50.

A. That's correct.

Q. And then if you turn to what you ultimately announced after there had been announcements by other competitors, and moved up to the date of September 16, 1968, instead of August 1, the half-inch wallboard price in Allegheny County is $48.25 instead of $50?

A. That's correct.

• • • • •

Q. • • • Number 438 dated October 25, 1968.

Number 439 dated November 14, 1968.

[10,434] Number 440 dated December 13, 1968.

And then—well, turning to those first, these price activity letters were directed to Mr. Nicely with copies to you?

A. Yes.

• • • • •

Q. Now, in the October 25 report, that was written by Mr. Kroth, as I understand it; was it not?

A. Yes.

Q. With reference to gypsum it reads:

> In early September the prices in Washington, Oregon, Idaho, and Utah were rolled back to the January 15, 1968 level less two 5-percent discounts, which represents an average decrease of approximately $2.50 per thousand square feet. This is scheduled to continue until the end of the year.
>
> In Arizona two truckload orders effective October 15th was authorized at carload prices less [10,435] 5 percent. This represents a $4.15 per thousand square feet reduction.
>
> Generally the competitive activity of more and larger discounts continued to spread.

And in November Mr. Atwell wrote in National Gypsum 439, dated November 14:

> Prices on gypsum continue to deteriorate . . .

• • • • •

[10,436] The WITNESS. Prices on gypsum continue to deteriorate. One competitor apparently unhappy with some discounts in Northern Colorado published new prices in that area reflecting $3.75 per thousand square feet lower than our list on half-inch board in the State of Oklahoma.

By Mr. DELONE:

Q. All right. I think I can see the rest of it. If I have trouble I will ask you.

> One of our competitors is now offering approximately 26 percent reduction in price, plus cash discount in the central part of the states. The same competitor is offering to take blocks of orders at low prices.

> In St. Louis they offered blocks of ten cars at two dollars less than the present competitive price on one-half inch board, and one dollar off the competitive price on three-eighths inch board. It is reported they have taken about a hundred cars.
>
> The same competitor offered a one-day sale, which extended beyond the day, in the state of Indiana at prices approximately $2 below the competitive price in the area.
>
> An extra 5 percent discount seems to be [10,437] sweeping the Northwest, namely the states of Washington, Oregon, and Idaho, bringing this to approximately three 5-percent discounts off our list price.

[10,438] In the Atlanta, Georgia, area we have encountered prices as low as—

I cannot read that. If you can, Mr. Hayes——

A. Low as 5 percent and $2 off of our list.

> Q. The same competitor mentioned above offered one large customer in Atlanta net prices on all gypsum products, which ran about 18 percent off list prices.

This document doesn't identify the competitor referred to. Do you know or are you able to say who it was?

A. No, I am not.

Q. And then that report from which I just read was November—And all of these are reports. In other words, following this increase effective September 16, '68, in November Mr. Atwell reported to you in National Gypsum 440 in December, December 13:

> Gypsum prices continued to deteriorate. The following moves were necessary to be competitive, since our November 13 price letter.
>
> In Dallas and Tarrant counties, Texas, last week one-half inch board dropped from $40 per thousand square feet to $35 on large cars.

And I can't read the words.

> This means the one-half inch board price is now $11.75 off published list prices.

[10,439] At the present time we are meeting our competitive prices in the State of Oklahoma, which represents 20 per cent off list prices. However——

A. "Yesterday and today."

Q. "Yesterday and today we are receiving reports that competition is dropping $1.50 a thousand. We were forced to open about 20 counties in the Indianapolis area to a $42—"

If you can read these better than I, check me. Check me if I misread them. I am doing the best with the poor Xeroxing.

> —to a $42 level on one-half inch board, which is $8 off our list price.
>
> To be competitive in Hamilton, Cincinnati, we have to open this county to a price of $41 on one-half-inch wallboard, which is $9 off our list price.
>
> In approximately ten counties around the Denver, Colorado Springs metropolitan area we were forced to open this area to 20 per cent off list prices on regular cream-faced board products, and 16 per cent on all other machine board products.
>
> At the last writing we were running into competitive discounts of 5 per cent and two 5 per cents in the Carolinas. But since then we are encountering many cases——

[10,440] A. "—Where two 5 per cent discounts are being offered by competition."

Q. Yes. "In approximately 20 counties in Milwaukee, Wisconsin, we were forced to four 5 per cent discounts to meet competition. We were forced to open an area known as Metropolitan——"

A. "Kansas."

Q. "—Kansas, which involves many counties, to a flat price of $27 on one-half inch board."

A. I believe that's 37.

Q. I beg your pardon. It is 37.

"—which represents $12.50 lower than published price."

"In the San Francisco area a $2 lower price appeared within the last week, which brought one-half inch board to a $34 level.

"Moreover, USG has announced an increase in the—" Or I guess it is "however."

> However, USG has announced an increase in the West Coast area to become effective January 16. We have followed, and so has Celotex. If this price goes into effect, one-half inch board will then be $42.50.

> There are additional discounts being offered to individual accounts around the country, but these are too numerous to mention. In many areas the [10,441] discounts are computed on old list prices of board published prior to September 18–16. We have notified all of our district offices that the old prices will be withdrawn effective January 1, 1969, and any discounts permitted will apply only to our new September 16 price pages.
>
> Also, in a few areas we were compelled to reinstate a 5 per cent cash discount to be competitive through 1968, so we will revert to standard cash discount terms in all areas effective January 1, 1969.

* * * * *

[10,442] By Mr. DeLone:

Q. Now, are those reports which I just read to you—as you recall the situation following this increase, effective September 16, 1968, are they characteristic of the information that you received in the ordinary course of business about how effective in fact the price increase was so far as selling at published list?

A. Yes, sir, they sure are.

Q. And do you have National Gypsum Exhibit 441 and 442 available to you?

A. Yes.

Q. 441 is a memorandum from Mr. Webster—both of these have been admitted, sir—to Mr. Hoodmaker, dated January 15, 1969. It reads:

> To meet Georgia-Pacific competition, please advise our plants that all Buchan Supply (Lowes) yards should continue to be invoiced at pre 9/16/68 prices on gypsum board machine products. This will continue until at least April 30, 1969.

That mentions Buchan Supply or Lowes. Who was that?

A. Well, Buchan Supply is the buying name for the Lowes' chain of yards, stores, and they spread throughout the southeast and middle Atlantic states, and they are and were our largest customer.

[10,443] Q. They were National Gypsum's largest customer?

A. Largest in the United States.

Q. And what was the effect of meeting the Georgia-Pacific competition at pre-September 16, 1968 prices?

A. We were able to retain our share of the business.

Q. You were able to retain your share of the business at Lowes; is that right?

A. Yes.

Q. But at a price below that published in September of 1968?

A. Yes, sir.

Q. And, finally, National Gypsum 442, a memorandum from Mr. Webster to Mr. Hoodmaker of January 13, 1969.

> Jim: We have found that the Georgia-Pacific Company is still using pre-9/16 prices in the New York metropolitan area. Therefore, effective 1/10/69 will you please reinstate any account in the New York and Long Island districts only at the pre-9/16 price level plus approved discounts where they had this pricing level prior to 1/1/69.
>
> The 5 per cent cash discount where it had been approved in these two districts only will also still apply.

Was that action taken?

A. Yes.

[10,444] Q. And did that have any effect in the marketplace, in the sales which you effected in New York and Long Island districts?

A. I can't answer that specifically.

Q. Now——

A. I don't know what the action was, what the result was.

[10,444] Q. Now, we just dealt with the 1968, September, 1968, published price increase and how it was developed and its aftermath, if we might call it that.

I would like to turn now to a price announcement, price action taken by National Gypsum, in May of 1969. In that respect I offer in evidence National Gypsum Exhibits 403–A, 404, 405, 406, 407, 409. That is the set.

I don't know, but I guess Mr. Grainer is doing the sorting at the same time.

• • • • •

[10,445] Q. Mr. Hayes, will you look first, please, at a document which has been marked as National Gypsum 404, dated January 29, 1969.

Do you have that one before you?

A. Yes, I do.

Q. Is that a document of two pages?

A. Yes, it is.

Q. And who is the author of that document?

A. Well, I was the author of that.

Q. Subject: "Gypsum Prices"?

A. Yes.

Q. The document has some handwriting on it. Whose handwriting is that?

A. That is my handwriting.

Q. Now, would you tell us why you wrote this memorandum on January 29, 1969?

A. Well, this is a document that was prepared preparatory to one of our meetings within the company that had to do with our price policy committee meeting.

Q. And I note that at the bottom of the first page you make reference to the fact that a $4 price increase in gypsum products, effective May 1, 1969, on budgeted volume, is needed to protect the 1969 budgeted profit contribution (annual effect $10-million—8 months effect $6.5 million)."

Do you see that?

[10,446] A. Yes.

Q. Would you explain what that means?

A. Well, at the time I was doing this analysis in January, at the end of January, 1969, we were into the new year obviously by 29 days, and we were selling our gypsum products at a level below which we were selling them in 1968, December, the previous month. And we were selling them at a level below that which we put in our budget for that year's business plan. So the first thing I tried to do was to analyze the effect of that and how much it would be below our business plan and profitability for that year if that price level continued. Then I took a look at a part of the business plan we had considered for how big the market was going to be, and we had an offset here. We thought the market was going to be bigger than we had originally set.

So there was an area of offset to our profitability for that year.

And then I did some computations which don't show here, of course, because this is a summary. I did some computations, and I came to the conclusion that at the rate we were losing the profit because of the lower prices, we would need a $4 price increase effective May 1 to achieve our business plan or budget profitability, and that would only be in effect for the last eight months of the year.

There is nothing scientific about this. This is [10,447] the kind of thing that businessmen do with great rapidity during a year to analyze where they stand against their plan, and where they are going, and what needs to be done.

[10,448] By Mr. DeLone:

Q. Well, now, you formulated some recommendations or tentative recommendations, as indicated by the second page of this document, did you not?

A. Yes, I——

Q. You outlined alternate courses of action, which included freezing prices and not meeting any further deteriorated prices, announcing a price increase or the third one, continue to react to competitive prices by meeting competition.

A. Yes.

Q. Which——

A. I have used a date in that previous one of what we would need to go into effect by May 1.

The reason I couldn't attempt to put a price increase before that is because United States Gypsum had announced previous to this time they were going to keep the price at no higher than that particular level until May 1, so I was caught on that situation.

Q. When you say United States Gypsum had announced that they were going to—not going to increase the price, or keep the price at the same level until May 1, 1969, do you have reference to, for instance, National Gypsum Exhibit 403-A, which is a copy of a USG letter to customers of November 21, 1968?

[10,449] A. Yes.

Q. Which the—in which United States Gypsum says, over the signature of Mr. Duffy, Group Vice President, "To give our customers maximum opportunity to plan ahead, we assure you that these list prices will not be increased prior to May 1, 1969," making a reference to the September 16, 1968 list prices?

A. Yes.

Q. And that, in effect, if I understand your testimony, locked you in so that you could not——

A. That is correct.

Q.—try——

A. On the other hand, I had a need for an increase to get back to our business plan, to cover our cost, and, on the other hand, I couldn't do it because of a previous announcement on the part of a competitor.

Q. Not only a competitor, but your largest competitor?

A. Yes.

Q. So you adopted alternate number three, which was to continue to react to competitive pricing by meeting competition as of January 29, 1969?

A. That is correct.

Q. Now, in fact, within two days after you were pondering what you would do and outlining the considerations, including a possible $4 price increase, United States Gypsum [10,450] came out with an announcement of a price increase for May 1, 1969; did it not?

A. Yes, sir.

Q. Do you have National Gypsum 405 there?

A. Yes.

Q. And that is a United States Gypsum announcement dated January 31, 1969?

A. Yes.

Q. And it indicates a date of January 31, 1969—it indicates a May 1 effective date and an increase of $5 on half-inch and five-eighths-inch board?

A. That is correct.

Q. What did you—you had been considering, but decided to wait—you had been considering a $4 increase.

A. Well, I was mousetrapped on that one. I wanted to announce a price increase, and I was afraid that if we didn't announce—I knew we needed $4. I was afraid if we didn't announce, somebody else would announce prior to May 1, and it wouldn't go up the $4, and I knew we needed that much.

So while I was delaying—as a matter of fact, shortly after, two days later, they made an announcement, and their announcement was $5.

Q. Did National Gypsum then subsequently make an announcement of its own? And I draw your attention to National Gypsum Exhibit 465.

[10,451] A. I have to have that.

465?

Oh, I have it. I have it.

Yes.

Q. You made an announcement, February 14, 1969, for price increase effective May 1?

A. That is correct.

Q. And you recall whether in the main, you, at National Gypsum, you and National Gypsum followed the—we might say followed the lead of United States Gypsum announcement?

A. As I recall, we did.

However, I think we changed some zones, and I know that we put in one other thing into our announcement, and that was that we now told the customers we would not increase the prices further than this until September 1, 1969.

Q. That appears in your—in the bulletin, National Gypsum 465, where it says, "To enable our customers to plan on future needs, these prices will not be increased prior to September 1, 1969"?

A. That is right.

Q. Now——

A. There was a constantly changing strategy involved here and USG had made a few points with customers by telling them they would guarantee it so long and how to bid their [10,452] jobs and protect their customers, and in this case I wanted to take the ball away from them and get a plug in with our customers.

Q. The United States Gypsum announcement of this May price increase did not contain any reference to, in effect, guaranteeing there would be no further price increases? That is 405.

A. That is correct, that is correct.

Q. But you put that in there by, as you say, taking the ball away from them?

A. Yes.

Q. Now, you have before you, I think, also, price activity letters, one dated July 18 and one dated August 20.

A. Can I have the numbers?

Q. The first one is 407 and the second is 409, National Gypsum.

Do you have both of those?

A. Yes, I do.

Q. These, again, are the same type of price activity that you have told us about, written fairly soon after the price increase that was supposed to be effective May 1. The July 18 letter, 407, reads, "Prices on gypsum continue to deteriorate at a rather rapid rate. We probably have lost at least one half of our May 1 gain in price at this time. In a recent trip, I found there are some areas where [10,453] we are not competitive, as we didn't believe prices were as low as they actually are."

And then, in August, in National Gypsum 409, Mr. Atwell writes, under Gypsum, "Prices continue to deteriorate to the point where we have lost the best part of our May 1 prices increase. Some prices are now lower than pre-May 1 prices. Price increases in Washington, Oregon, and Arizona to be effective August 4 did not become effective. We are handling extension of old prices on a 30 day basis to determine what competition is doing."

A. Correct.

• • • • •

[10,459] By Mr. DeLone:

Q. Mr. Hayes, do you have available National Gypsum Exhibits 410 and 411?

A. Yes.

Q. These are both communications to you from Mr. Brown, one in February and one in May of 1969?

A. Yes, sir.

Q. And did you from time to time receive communications from Mr. Brown on this subject of these two memoranda, one said gypsum wallboard prices, the other gypsum prices?

[10,460] A. Yes.

Q. And could you summarize in a general way the sort of communications you did receive from Mr. Brown on this subject, both verbal and written?

A. Well, I received—as you would expect—a number of communications verbal and written . . .

Mr. FRICANO. If Your Honor please, I think that is an instance where I suggested to the Court once before that a voir dire examination of a witness to test his competency to testify is appropriate. And I will illustrate how I mean that.

Let me just illustrate, if I may. This witness is testifying about a major price increase, yet one of the key documents from his Chairman is missing, and he couldn't remember what was in it, couldn't remember anything about it. Now, how can he answer a question posed by Mr. DeLone?

The COURT. Now, what you are suggesting is a matter for the jury to pass on, it is not a matter for the Court to pass on. And certainly this man is competent to testify, and we are not going to have any voir dire at all concerning that.

Mr. DELONE. And I would like the record——

The COURT. Proceed.

[10,461] Mr. DELONE. I would like it to be clear the witness has not testified there was a note from Mr. Brown. He has said there was something attached. He doesn't know whether it is something he put on it which said, "Note attached," or whether it is something that came from Mr. Brown.

The COURT. Go ahead. I have noted this all occurred in 1969, and this is 1975.

Mr. DELONE. Thank you, sir.

• • • • •

A. —in regard to gypsum wallboard prices. And the subject was one that was in front of us, because it was a problem at that time. Our prices were too low, and they were deteriorating.

And to put this in the proper context, you got to realize that Mr. Brown had lots and lots of responsibilities involving some 6, 7 other divisions, and that gypsum was half of the business in one of the divisions. So that this wasn't a constant thing with him, but it was a major problem in the business, and it was my responsibility.

[10,462] So, we would discuss it periodically, and then on occasion he would write and request action of some sort on my part. And these are examples of requests for action on my part, written.

Q. Or would you call them needles?

A. Well, I'd say they were stronger than needles.

Q. And I take it that when you got a request for some action from Mr. Brown, or a suggestion that if there was going to be a meeting he'd like one scheduled, a meeting to discuss the subject, he'd like one scheduled so he could attend such—as in National Gypsum 411. You responded to his . . .

A. Yes. In the instances where he did request his being present at some meeting, why of course I responded.

Q. And National Gypsum 412 is such a response?

A. Yes. This is a written response on my part referring to his previous May 16 letter.

[10,463] By Mr. DELONE:

Q. And in the response you state, in part, on May 19, 1969:

> K. H. Atwell was requested to have his department prepare a completely documented plan reducing the number of gypsum zones from 41 to a small number, and definite alternative course of action available concerning price increases and reduction of discounts.
>
> The next meeting is set for June 3 in the late afternoon at which time a recommended course of action can be developed from the alternatives.

Now, that was on May 19, 1969?

A. Yes.

Q. Did something occur between May 19, 1969, and the June 3 meeting which altered the situation in that regard?

I call your attention to National Gypsum's 413.

A. Yes. My letter of May 23, which is 413, is the letter from me to Colon Brown, referring to my previous letter, at which time I told him we would hold a meeting and we would discuss the various alternatives available and arrive at a plan. And in this letter I am informing him that prior to the time of our holding this meeting why United States Gypsum Company had made two customers a price increase notice.

[10,464] Q. Where did you learn that?

A. From our customers in the field, as I stated in the letter.

Q. And then you said in your May 23 communication:

> Therefore, we have discontinued action on our plan until such time as we have made a thorough analysis of

the effects of their announced price increase. As soon as this analysis is complete, we will give you a briefing on the subject.

A. Yes, sir.

Q. Now, Exhibit 414 is a handwritten note, National Gypsum 414. Are they your notes?

A. That is my handwriting, yes.

Q. And that is your notes of a June 3 meeting on this subject; is it?

A. Yes.

Q. And Exhibit National Gypsum 416, is that also your handwriting?

A. Yes, that is my handwriting.

Q. And those are notes you made at a meeting held on June 6; is that correct?

A. That is correct.

Q. And then 417 is a document of some three pages; is that what you have before you there?

A. Yes, I have.

[10,465] Q. Is yours three pages, because there was some confusion in assembly of some of these exhibits.

A. Mine is three pages.

Q. And without the necessity of our having to get into trying to read all your handwriting, that is a document headed, "Recommendation."

Did you cause that to be prepared?

A. Yes, I did.

Q. And it substantially reflects the recommendations which appear in your handwriting on June 6, 1969; does it not?

A. Well, the June 6, 1969, and the handwriting, that is my recommendation as summarized at the time of the meeting, and in my handwriting. Then I prepared, using that as a base, I prepared the recommendation and had it typed, a tentative plan, and the reasons behind it.

Q. Was the tentative plan to follow substantially the USG price announcement, but to consolidate four of their announced price zones into two?

A. Yes.

Q. And to include a statement that prices announced will not be further advanced before March 31, 1970?

A. That is correct.

Q. And did you then include an explanation of the rationale—or, I am told that the correct pronunciation is [10,466] "rationalia"—and if you look it up in the dictionary, you will find it, at least, sir, at least in the Oxford.

* * * * *

The WITNESS. You mean the reason why I did it?

By Mr. DELONE:

Q. That is a better way, despite the fact you used the word that gives me so much trouble; and that is the reason for consolidation of zones?

A. Yes.

Q. And also, then, there is indicated on the next page the tentative plan for increasing prices and further consolidating zones up in April of 1970?

A. Yes.

Q. But tentative at this time?

A. Correct.

Q. What you are talking about, as of now, is what you are doing—as of the time of this memorandum, the immediate problem is what you are going to do effective September 1 in light of the United States Gypsum announcement which you have received while you were considering this whole subject?

[10,467] A. That is correct. At this time, for some 18 or 19 months, prices had been going steadily downward throughout the United States, and one of our plans that we studied was a constantly increasing price schedule in the future, and that is why I have reference to tentatively set some more dates for future entries.

Q. In 417-A, a document about which there have already been some questions on the subject gypsum wallboard price increases. June 11, 1969, from Mr. Hayes to Colon Brown, it says:

> Attached is a Plan of Action, Time Table for Gypsum Wallboard Price Increase, and a sample price bulletin.

And did you transmit that document to Mr. Brown?

A. Yes, I did.

Q. And, as transmitted, did it include this plan of action?

A. Yes, it did.

Q. The plan of action also bears the same date, June 11. I note on page four, in explaining the opportunities or the advantages of the plan of action, you say—

A. I'm sorry. What document are you on now?

Q. I am sorry. Page 2, paragraph 4.

A. Oh, all right.

Q. On 417–A.

[10,468] You point to one of the features of what you are proposing as: "Sets up future removal of discount opportunity as competition in the field warrants this choice."

A. Yes.

Q. What do you mean by that?

A. Well, I am explaining that this position, this action on our part, has these following opportunities, one of which is the one which you just outlined, and here I am talking about separating these—we are in a position to separate these products into various product categories.

One of our problems that we had experienced in the past had been that with a competitive situation where there is a flat discount of X percent or X dollars, it applied to everything across the board, some of which would have been, might have been, products that were proprietary to us or nearly proprietary to us; so, by putting them in various categories, we could screen those out, and we wouldn't have to make discounts on those, on that type of product.

Q. Now, this is the document where, on the plan of action as attached, you have written: "O.K.," with your signature. And is the next "O.K."—is that your handwriting or Mr. Nicely's?

A. That is Mr. Nicely's.

Q. What authority did Mr. Nicely have to deal with a published price change?

[10,469] A. He had none.

Q. But he was one of the persons whom you consulted in formulating your reference to Mr.——

A. He was a member of the Price Policy Committee, and he was our Vice President in charge of Sales, and I did consult with him; yes.

Q. Now, this is where it also says, "Not approved by C.B.," Colon Brown, "Note attached." And you don't know what the note was or where it was, if there was a note?

A. No, I do not.

Q. But did you provide with a National announcement with reference to price increases—I call your attention in that respect to National Gypsum 418.

A. Yes, sir.

Q. And that was a June 30, 1969, announcement, to become effective September 1, 1969?

A. Yes.

Q. That was the same date as the USG announcement that had come out while this matter was under study?

A. I believe so.

* * * * *

[10,471] Q. Now, Mr. Hayes, do you have before you National Gypsum 418?

A. Yes.

Q. And that is an announcement which National Gypsum made on June 30 for price increases, September 1, 1969?

A. That is correct.

Q. That was the USG effective date?

A. I believe so.

Q. And this contains the statement, again:

> To enable our customers to plan future needs, these prices will not be increased prior to December 1, 1969.

A. Yes.

Q. That was in your earlier plan; was it not?

A. Correct, correct.

Q. And I note also, that, in this price bulletin, you have described your wallboard products as Group A. I guess they are—are they all wallboard products, Group A?

A. They are all board machine products, but they are not all wallboards.

Q. All board machine products. And they are, here, broken into four categories, Group A, Group B, Group C, and Group D.

A. Correct.

[10,472] Q. And was that in line with the recommendations you had formulated?

A. Yes, sir.

* * * * *

Q. Mr. Hayes, after you made your announcement on June 30, 1969, did you write the letter which is National Gypsum 419?

A. Yes.

Q. And to whom was that letter mailed or transmitted?

A. This letter was directed to all of our sales people?

Q. Had you written such letters prior to July of 1969 to your whole sales force with reference to prices of gypsum wallboard?

[10,473] A. No, sir, I don't recall having written any of them prior to this time on that subject.

[10,474] By Mr. DeLoxe:

Q. I want to call your attention to a couple of paragraphs in the letter, but it is five pages.

Would you characterize it as a pep talk?

A. Well. I thought of it a little more seriously than a pep talk, but I imagine some of the sales force would think it was a pep talk.

Q. You were at least trying to fire them up were you?

A. Yes, sir, I was trying to place the attitude in their minds that would be responsive to what our actions were.

Q. And you said on page 2——

A. Remember, that these salesmen in the field and sales managers now for many months had been very confused because the pricing structures were breaking down in all directions, and with such rapidity, and quite often they didn't know what the pricing structure was, so I am trying to set a stage here to bolster their morale, if you will.

Q. In doing that you said in part on page 2,

> Over the past several years of cost increases our selling prices have gone up—and down. On balance our cost incerases have outrun our ability to raise our prices. This is sufficiently serious that we have had to adopt strong measures to resist further unrealistic cost increases.

[10,475] And it continues in the next paragraph:

> We are involved in a highly competitive business and we have been for several years. This has limited our ability to increase our prices and absorb the increased costs. Therefore, as prudent businessmen, we have had to hunt for ways to cut costs which we thought were of less than major necessity.

Going on to the third page:

"Historically in price publications we have referred to future dates in anticipation of further action.

> We are in the position of following the September 1 price announcement of a competitor to a large degree. Had we been the leader, we would likely have been substantially higher in our price announcement. You will note that we have again followed our past practice in referring to a future date. At this time our studies as to what action we will take are incomplete, but it is well to note that our basic position is unchanged. Our prices simply must reflect the cost of doing business, and in your discussions with customers you can frankly state that our reference to a future date is, as in the past, to give our customers an element of advance guidance to help them in planning their business.

Now that was with reference to the price increase [10,476] that you announced on June 30 to become effective September 1, 1969.

And now—and you have here as 420 another price activity letter dealing with the effectiveness of that price increase.

A. Yes.

Q. It reads in part:

> The price increase——
> The price increase announced September 1 is only——

Now, actually, was the announcement or effective date September 1?

A. It was effective September 1.

Q.

> . . . is only partially effective.
> Competitively we have found it necessary to revert to old prices which in some cases are the prices prior to May 1, for at least the balance of this year.

Then it goes on detailing particular incidents of competition in various parts of the country and discounts.

Q. What other alternatives did you consider before determining alternate number four?

A. Well, we considered publishing a new price list at a higher list and permitting the current discounts to apply, or to add dollars to the present list price, which would have been substantially the same thing.

Number two would be to keep the published list the same way it is and eliminate the discounts, or make a partial elimination.

Number three was to do nothing. That was an alternate that falls in every one of our deliberations. [10,479] and wait.

Number four was to rezone at a new lower price and eliminate the discounts. And the reason—one of the reasons that one was chosen, among others, was that the distance between list price and the discounts had become substantially—substantial.

Q. When you say substantial, would you give us some indication of the magnitude?

A. Well, I would have to refer to other documents on that, but the price had been going down now. This is October of 1969. The price had been going down at a constant trend for 22 months.

[10,480] By Mr. DeLone:

Q. Would you look, Mr. Hayes, at the fourth—I guess it is the fourth page there not numbered, the page that is entitled "Results of Plan Four." Do you see that?

A. Yes.

Q. And that says—

A. It lists.

Q. From looking at Item 2 on that, can you tell us approximately what the difference was between list and actual prices at this time?

A. Yes, it says the—it averaged approximately $7 increase from the present actual selling price. That is the new plan. And it says approximately, approximately $7 on average below the published list. So at the——

Q. Go ahead.

A. The drop below is $14 on average by this estimate.

Q. And your plan four, the plan you recommend, contemplating, if you might call it that, splitting the difference between the published price and the level of actual prices——

Now the next major price move to which I want to call your attention is a move which was effective in January of 1970 and that——

Mr. DeLone. In that regard I offer in evidence National Gypsum Exhibits 421, 422, 424 and 425.

* * * * *

[10,447] Q. The first of these documents is a memorandum from you to Mr. Colon Brown, subject "Gypsum Price Increase, September 25, 1969," setting forth the time table in which you proposed to develop recommendations concerning a possible announcement of a future price increase, is that correct, Mr. Hayes?

A. That is correct.

Q. And 422, that is a memorandum from Mr. Atwell to Mr. Kroth enclosing a fairly—enclosing about four or five pages of material. The memo—the memorandum is so short, I think I might just read that.

> As a result of the meeting we held on October 6——

This is dated October 14, 1969.

> —attended by the Chairman, Colon Brown, Mr. J. P. Nicely, Mr. J. P. Hayes, Dan Webster, you——

The you is Kroth. The memorandum is directed to Mr. Kroth.

> —and myself we had decided to proceed with the program outlined in the attached considerations as shown under alternate number four. I am giving [10,478] this to you for your file for any future reference.

Now, have you had a chance to look at the attachments?

A. Yes.

Q. Could you tell us what the decision was arrived at as a result of the meeting on October 6—October 6, 1949, with reference to the alternates that National——

A. The National number four was to rezone and——

Q. If I——

Somebody tells me I said 1949, not '69, so it is obvious I should not try French. I can't keep my English straight.

A. The alternate number four was to rezone and at a new and lower list price and eliminate discounts.

A. Yes, if we were—you know, we may be concerned and may always make the right judgment on these things, but we are not completely stupid. At least I don't think so.

But, one of those alternates was to eliminate [10,481] all the discounts and sell at our list price. This would have been on average a $14 price increase.

Q. Did you think that was achievable?

A. That, in my opinion would have been stupid. It would not be achievable.

Q. And in National Gypsum 424——

The Court. May I ask if it would have been achievable, would it have been stupid?

The Witness. No. I would have to be careful about the semantics involved here, but I will say in the desperate situation I was in, if I could have achieved it, I would have done it.

By Mr. DeLone:

Q. National Gypsum 424 is a memorandum from Mr. Kroth to the dealer sales force that covers the transmittal of the new—of the National announcement of the recommended plan four, does it not?

A. Yes.

Q. And that was transmitted to your customers October 10, 19— well, the letter to the customers dated October 10, 1969 indicates an effective date of January 1, 1970 for these prices you were contemplating?

A. That is correct.

Q. And you explained—I assumed you saw the letter to the customers before it went out?

[10,482] A. Yes, sir.

Q. It says in part,

> Effective January 1, 1970, we are revising our prices and policies on gypsum board, lath, and sheathing products. These new prices enable us to partially recover the spiraling costs of manufacturing, wages, raw materials, etc., experienced to date. As a matter of fact, some of these prices are actually lower than the prices in effect ten years ago on comparable products.
>
> The vigorous, competitive activity which has resulted in various price levels in many markets, causes us to be concerned. Therefore, we have rezoned areas and revised policies to assure our customers they will receive equal prices and services within a zone.

Do you have——

Mr. DeLone. Might the witness have Government Exhibit 3138? I don't believed I called that out before. Previously it has been admitted.

The Witness. I have it.

By Mr. DeLone:

Q. Oh, you have it?

A. Yes, it is attached in this case.

Q. Is that a document dated October 10, effective date January 1, 1970, covering, among other places, [10,483] Allegheny County?

A. It covers Allegheny County, but would you give me those dates again?

Q. October 10, 1969, the date on the document. The effective date of the prices scheduled there, January 1, 1970.

A. No.

We are talking about GX 3139?

Q. No, 3138.

A. Oh, I am sorry. I misspoke, then. I had it in error.

* * * * *

[10,484] Q. Now, in Government Exhibit 318, which you now have before you, the price bulletin which was sent out on October 10 to—3138.

A. This is 3138 that I have and it is a price bulletin dated October 10 for prices effective January 1 on gypsum board products and it does incude Alegheny County, Pennsylvania.

Q. And what was the price schedule to become effective January 1, 1970, in that bulletin, 31, which is Government Exhibit 3138 for half-inch wallboard?

A. $50 per thousand.

[10,485] By Mr. DeLone:

Q. Does this price schedule again retain the four groupings of gypsum machine board products?

A. Yes, sir, it does.

Q. Now, did the price schedule which you proposed and announced in your October 10, 1969 bulletin become effective? And in that respect I call your attention to National Gypsum 425.

A. No, it did not become effective on January 1st as planned.

Q. What is that document?

A. This is a wire, a teletype to all of our sales, divisional sales offices, district sales offices, to our regional managers, who were located in the field, to our plant managers, and to our sales order supervisor at gypsum plants. In fact, anybody connected with gypsum prices and ordering at that time.

Q. And it reads . . .

A. From Mr. Earl Kroth in the Sales Administration Department. Do you want me to read it?

Q. Well, it is short. Go ahead and read it.

A.

> Our price increase on gypsum board machine products announced to be effective January 1st, 1970, is hereby deferred until January 12, 1970. You will be advised shortly concerning lower competitive prices [10,486] which you have reported with bona fide evidence.

Q. And now, do you still have GX3139 up there?

A. Yes, have.

* * * * *

Q. And is that a page out of a National Gypsum price book?

A. Yes, it is.

Q. Covering Allegheny County?

A. Yes, it is.

Q. And does it cover the prices which went into effect as of January 12, 1970?

A. Yes, sir.

Q. And remember your announcement, Government Exhibit 3138, had indicated that effective January 1st there was going to be a $50 price for half-inch wallboard in Allegheny [10,487] County, and then that was held up because of competitive announcements.

What is the ultimate price which went into effect in Allegheny County on January 12, 1970?

A. On half-inch wallboard it is $47 per thousand square feet.

Q. Do you recall whose announcements, or what announcements intervened between your original announcement and the ultimate $47 price on January 12?

A. No, I don't recall at the moment.

Mr. DeLone. If Your Honor will indulge me just a moment.

Oh, I see, I am jumping a whole year now. I want to turn now to January 4, 1971.

I am pleased to advise the Court that because of the price freeze I will be able to deal with that in a fairly short session without going through them one by one, so we have only one more review after this one in any detail.

* * * * *

[10,488] Q. The first document in this collection, National 429, is dated September 28, 1970. That's a report from you to Mr. Colon Brown on this subject of gypsum pricing?

Do you have it there?

A. Yes, sir.

This is 429.

Q. And there you summarized in your report to Mr. Brown your pricing experience in the year 1969 in one paragraph; did you not?

A. Yes.

Q. Which reads as follows:

> "Throughout this year——"

This is 1969 experience.

> "—the size of the construction market was continually shrinking with the impact of continued tight money. We assumed a strong position of [10,489] leadership in attempting continued price increases. Our price increases attempted in January, May, and September eroded in the months following the effective date.
> However, at year end our selling price level was not substantially below the year's average price and, thus, despite a decreasing marketplace, we had effectively maintained a fairly level gypsum price level even if we were unsuccessful in our attempt to increase the price level.

And then you turn to the year at hand, 1971. That was written in September of 1970; right?

A. Yes. The year at hand is 1970.

Q. Right.

And you summarized again in a paragraph your experience to date, 1970 experience:

> In the current year we attempted a price increase in January which was unsuccessful. This was posted near to the low point of residential construction volume. Prices continued to erode to a low in June, and it now appears that prices for the last half of 1970 will be on a trend increasing modestly from the low June level.
>
> As a matter of policy, we declined to take a leadership position in price announcements after the [10,490] second quarter of 1970. In monitoring the activities of our major competitors by reports from the field, it is apparent that these competitors have vacillated back and forth in attempting to increase their selling prices, and the actual result in the field has been negligible improvement.
>
> It seems apparent that without 25 percent market penetration we are too large a factor not to take an aggressive position in regard to prices.

Now, Mr. Hayes, you say in there "as a matter of policy we declined to take a leadership position in price announcements after the second quarter of 1970,"

What do you mean?

A. Well, we had on several occasions been the leader in publishing price increase notices.

And, as I testified yesterday, you will recall that the leader—if the price does not go into effect the leader has to stick and find out what is going to happen, at least for some time, and normally is the one that gets cut up pretty badly when it doesn't take.

And, frankly, we got tired of getting cut up, so we decided that well, we are not gonna be leader any more this year, and that was our change in our policy and our attitude. Nobody was a follower. You can't be a very good leader if nobody follows.

[10,491] Q. But you are now proposing, or you are facing up to what you are going to do in 1971?

A. All right.

Now, I had now changed my opinion. I was saying that—all right. That may have been a good strategy before, but now I am saying we should change our strategy. I think we have reason to become aggressive again.

Q. What were the reasons, as you remember them?

A. Well, it is stated some place in here.

One of the reasons was I could see that the market was beginning to turn upward, and that the further erosion of the price had kind of reached a standstill. It was not dropping as rapidly as it had been in the past.

Q. Now, in this document when you are discussing 1971 on your proposing to be aggressive, you referred to rolling gypsum price increases by regions and by products.

What are you talking about there?

A. Well, you now, there really are very few new things on the subject of pricing. And I don't care whether you are pricing Persian rugs in the Arab Bazaar, or whether you are pricing gypsum products in this kind of a market. There are only a limited number of things available to you. So, search as you might for innovations—and that was one of the things that Mr. Brown was always challenging me to do, to find some innovating way to do something different [10,492] than had been done before—you can stand pat. You can try to raise your price. You can cut your price. And there are various things available to you.

But I did come up with what I thought was an innovative idea at this time. I don't get too many original ideas, but I thought this one was. And that was, that we would—we had the zone set-up—and that instead of trying across-the-board increases and taking a big risk, the very thing that had happened to us in the past when we were losing our position and losing our business, that we would try and increase in a zone. And, depending on the result of that, we'd try it in a different zone. And we had enough zones so we could move around.

If it looked like that sort of action was going to take, why then we would have what I referred to as rolling increases by zones in more modest amounts perhaps. And that way, by our bootstraps, lift the price structure.

Q. Now, that's what you are referring to then on page 2 where you recommend taking aggressive position by announcing—well, there it says:

> An aggressive position by announcing a general gypsum price increase of approximately 8 to 10 percent magnitude effective December 21, 1970.

Is that qualified by "G" under that? Does that [10,493] mean you are going to do it on a rolling basis?

A. Well, that was for 1970.

The rolling basis applied to subsequently, after that went in.

Q. To your thinking for 1971, you mean?

A. Yes. I would plan to make those announcements on a regional zone basis after that.

Q. Now, this report to Mr. Brown was written September 28. Do you know whether you put out an announcement as the leader in 1970 for a price increase in early '71, or effective December 21, as you were cogitating?

A. You mean after this?

Q. Yes. Look at National Gypsum Exhibits 475 and 476.

A. Yes.

Q. What is that?

A. Well, the 475 is a letter from our Phoenix District Sales Manager to a man in our Pricing Policy Department in Buffalo. And he attached a Georgia-Pacific price bulletin which he picked up in the field, and it was dated—this letter is dated November 10, an the Georgia-Pacific bulletin was dated November 1st. He picked it up from the manager of the O'Malley Lumber Company—or Building Materials Company in El Paso on November 6. And it is an announcement of a price increase on the part of [10,494] Georgia-Pacific.

Q. And do you have National Gypsum 476 there? Would it be fair to say that's a U.S.G. similar announcement dated November 13, 1970, for prices to be effective January 4, 1971?

A. That is correct.

Q. Now, did those two companies then both put out announcements of price increase prior to any announcement by National?

A. Yes, they did.

Q. And so what you recommend on page 2 about making an announcement effective December 21 didn't come to pass because competitive announcements intervened?

A. That's correct.

Q. And National Gypsum ultimately did announce, as per Government Exhibit 3143, on December 16, for a price increase effective January 4, 1971?

A. That's correct. We were still not leading, we were followers.

Q. And in National Gypsum 426 and 427 and 428, they deal—do they not—they are internal National Gypsum documents dealing with the plans you have in mind or then have under study for possible increases by zones in 1971?

A. That's correct.

[10,495] By Mr. DeLone:

Q. Now, did you make a price announcement for a change to be effective April 1, 1970?

A. Yes, sir.

• • • • •

Mr. DeLone. This is 1971. If I said 1970, I reassure you I am not going back.

• • • • •

Q. What is 430, Mr. Hayes?

A. 430 is a report, some 16 pages, from me as president of the Building Products Division to Colon Brown, [10,496] Chairman of the Board, to whom I reported. And it is entitled "Building Products Division, 1970, Activity Letter." And this is a general review of what actions happened in 1970, and a broad spectrum of things, and what the general business condition was. It is a general activity letter.

Q. And does it report on prices of gypsum machine board products at pages 4, 5 and 6?

A. Yes. As a matter of fact, I discussed—yes, it does.

Q. And did you there discuss the continuing deterioration of gypsum prices, the unsuccessful efforts of other manufacturers in 1970 to increase gypsum machine board products?

A. Yes.

Q. And the erosion, the erosion which you realized, which you experienced in your price realization for gypsum board products?

A. Yes, it reviewed the whole year and the erosions and the attempts and lack of success.

Q. And it notes—these are your comments on page 6—

> Of the total unfavorable price realization from the 1970 budget level of 14,144,000 gypsum accounted for 13,907,000.

What does that mean?

[10,497] A. Well, again, referring back to an earlier comment I made. Our business plan for the year, or a budget, presumes a certain selling price level and certain volumes. This comment deals only with whether or not we achieved the selling price levels which we had planned for or budgeted. And this states that we missed our budget target as a matter of price realization level in all products by $14,144,000. And gypsum accounted for 13,907,000 or practically the entire missing of the target was in the gypsum area.

Q. Now, you will recall that in the last—in the exhibit that I showed you a few moments ago, your September, 1970, letter to Mr. Brown, you had indicated your purpose to take an aggressive stance on prices in 1971 and to adopt, if you could, the rolling increases.

Did National Gypsum make an announcement of a price increase on February 1, 1971?

A. Yes, we did.

Q. And that was to become effective on what date?

A. April 1, 1971.

• • • • •

[10,498] Q. Was there another price change on June 14, 1971?

A. Yes, there was an announcement.

• • • • •

Q. Have you had a chance to look at those documents Mr. Hayes?

A. Yes.

Q. And do they disclose that on April 30, 1971, United States Gypsum made an announcement of a price increase, and that National Gypsum made an announcement on May 13, both to become—well, no, I am sorry. USG showed an effective date of June 7, but your announcement [10,499] showed an effective date of June 14?

A. That is correct.

Q. And in the June 14 announcement, what was the price announced for Allegheny County for half-inch wallboard?

A. $45 per thousand.

The Court. That was the increased price, not the price increase I am sure.

The Witness. That was the new list price.

The Court. All right.

By Mr. DeLone:

Q. New published price?

A. Published list price.

Q. And the activity letter which is National Gypsum 469, of July 16, 1971, deals with this subject.

> The June 14 price increase on gypsum failed to take effect in many areas. However, we have elected to sell at our list prices and meet competition on a very selective basis. On July 2, USG mailed nation-wide price notices of $2 per thousand square feet on regular board and lath items, to become effective August 21, 1971. After due consideration, we elected to do the same and today we are completing our mailing of a similar increase effective August 23, 1971.

[10,500] Do I take it from that that in 1971 you were not able to achieve your concept, your original idea, of rolling price increases by zones?

A. That is correct. I never had a chance.

Q. And do you remember what happened to the increase which United States Gypsum announced July 2 to become effective August 21, and your announcement to become effective August 23, 1971?

A. Well, approximately a week before the effective date of the increase, President Nixon went on the air and froze everything and locked me out.

Q. Incidentally, you mentioned, or we are talking now about the period 1971—did the organization at National Gypsum at that time continue with you reporting directly to Mr. Colon Brown?

A. No. In March of 1971, we elected a corporate president, and he was with our company for two years, through March of

1973. So during that period I did not report directly to Mr. Brown. I reported to Mr. Tucker.

[10,501] By Mr. DeLone:

Q. But did Mr. Brown still have time—I mean, were the recommendations about pricing of gypsum wallboard still formulated by you?

A. Yes, the ultimate policy had not changed. The policy had not changed in that regard. I had full responsibility for pricing in the gypsum area from '68 through '73 and when it came to changing the published prices, I still was operating under the policy of making recommendations and securing concurrence.

Of course, in the two-year period when Mr. Tucker was there, most all of that time was under price controls, and we had very little need for that procedure, although we followed it.

• • • • •

[10,513]

By Mr. DeLone:

Q. Mr. Hayes, before the luncheon recess we had dealt with a substantial number of price changes, published price changes, covering the period from May, 1967, decrease announced by National, up until mid-1971. And these were all changes or announcements which were a broad application, as I recall them.

Now, did National, in addition to these broad published price changes—I noticed, as a matter of fact, you had mentioned in one of the documents we were discussing just before lunch, that you had a plan for area or regional price increases which never became operative.

Did National respond with or announce price changes on a narrow area basis in any case, or adopt prices, changed prices in small localities or in limited areas in addition to the changes we have been talkng about?

A. Yes, we did. Primarily in the area of price decreases, where we would find that a given competitive price situation was prevalent in an area, we would change an area to meet that situation by internal vote and supplement.

Q. Would this be a few counties or several states, or is there any . . .

A. It could be either one of those.

[10,514] Q. It could be either one. And was there any time period when this was particularly prevalent, if you recall?

A. Well, I believe . . .

Q. In your experience. And I am now referring to, of course, mainly '68 to '73 when you were in the driver's seat, so to speak.

A. It was particularly prevalent in 1970, I believe.

Q. Do you recall whether it continued in the early part of '71?

A. Yes.

Q. Now, also just before the break there had been reference to National Gypsum 469, a price activity letter in July of 1971, which commented on . . .

A. May I have it?

Q. Oh, I am sorry. Excuse me, Mr. Hayes.

Do you have it now?

A. Yes, I have it.

Q. I had referred to the portion of that dealing with gypsum pricing which comments on the fact that United States Gypsum on July 2, 1971, mailed a nationwide price increase. And, after due consideration, National Gypsum decided on July 16 that it would mail a similar increase effective August 23, 1971.

A. That's correct.

Mr. DeLone. And could the witness [10,515] have, please, Government Exhibit 3146. And, also National Gypsum 467 and 431. That's it.

• • • • •

[10,516] Q. All right.

Now, do you have before you, sir, National Gypsum—I am sorry, Government Exhibit 3146?

A. Yes.

• • • • •

[10,517] Q. That's the National price bulletin that is an announcement of July 16th calling for a price increase on August 23?

A. Yes, sir.

Q. Which we have just been adverting to and was dealt with in the price activity letter of July 16.

Now, did that price increase go into effect on August 23?

A. No, sir, it did not.

Q. Why not?

A. Because the effective date was after the effective date of the Government price control in August of '71. So we had no ability to put it into effect.

Q. And did National Gypsum—that was when the President, you said, announced a freeze on all prices?

A. Yes.

Q. And did National Gypsum abide by the Presidential freeze?

A. Yes, sir.

[10,518] Q. And that was by executive order on August 15, 1971?

A. Correct.

Q. Covering a period of how many days, if you recall?

A. I believe it started with a 90-day freeze.

• • • • •

Q. Now, thereafter in the remainder of 1971, 1972, and up to December 27, 1973, were prices of gypsum board machine products controlled under one phase or another of the price control program initiated following the Presidential freeze?

A. Yes, sir. Until April of 1973–'74.

Q. And during that period of time did National, was National able to increase its prices, its published prices?

A. On occasion, yes.

Q. And was that pursuant to some authority obtained [10,519] from the regulatory bodies that were administering the price freeze?

A. Yes. We followed the regulations as required by each one of the phases, and did the necessary submission to the Government, and had the necessary audits by the IRS of our cost factors, which we indicated on our reports.

Q. By the IRS?

A. The IRS was the auditing arm.

Q. The Internal Revenue Service?

A. Yes.

Q. Okay.

A. And we submitted—We studied this thing almost daily because our costs were changing daily. And, we submitted our

requests for approval to increase price ceilings as often as we could.

[10,520] By Mr. DeLoxe:

Q. And what, broadly speaking, throughout this period of regulation and up to the period of December 27, 1973, which is when, as I told you before, we stopped, broadly speaking, what was the basis for obtaining approval of your right to announce an increase or to charge a higher price?

A. It shifted from phase to phase. We had kind of a floating base. The main point was that we were allowed to pass through our cost changes so we had to itemize those. In some cases, we could pass through cost changes, but also we were under a profit margin ceiling.

Q. Now, was there a time lag involved between the time you were exposed to increased costs and the time you could get an approval to pass through those increased costs by way of a raise in the ceiling the Government had imposed on your prices?

A. At all times there was a substantial time lag. Under some phases it would take—well, first, we had to accumulate the actual information from our cost accountant which meant that the period had to pass before you could start accumulating. It would take a number of days or weeks to accumulate the information. Then we would submit the information on the proper Government form, and we would then be subject to various delays, sometimes 30 days, [10,521] or various rechecks and asking for further information. But there was substantial time delay in every case.

Q. Were your submissions to the authority that were administering the price freeze, were those submissions done on National Gypsum's own acount, or were they done jointly?

A. We did everything individually, National Gypsum's own account. No price increase request at all were done in any other manner.

Q. I show you National Gypsum Exhibit 470. Do you have that there? I don't know whether I asked for that.

• • • • •

Q. 470 is an announcement which you put out to your customers, January 17, 1972, reading in part:

[10,522] In accordance with Government price regulations, we have applied for and have been granted per-

mission by the Price Commission to increase our prices for gypsum board machine products.

And then it goes on to announce a price change pursuant to that authority.

A. Yes, sir.

Q. And is that essentially how you proceeded to the extent there were any changes in your published prices from then until the end of 1973?

A. Yes, we did. I believe this was the first one; however, there was another area here, and that is that even if we got the Government approval, we may not be able to put it into effect if other of our competitors in the marketplace had not gone for approvals or had developed an ability to put their own into effect.

Q. I didn't mean to suggest this was anything more than publish.

A. This isn't guaranteed that we were going to get it.

Q. This is what you were in a position to publish; it does not necessarily say at what price you in fact effected transactions with your customers?

A. That is correct.

Q. That is true of any list price or published list [10,523] price isn't it, Mr. Hayes?

A. Yes, sir.

Q. Now, National Gypsum Exhibit 431, which you have before you, is one of your reports this time to Darwin Tucker who is the man who was president of National Gypsum Company in the period 1971–72——

A. Yes.

Q. —on the activities, the 1971 activities of your division?

A. Yes.

Q. And it deals here in one or two fairly short paragraphs on page 2 with the subject of prices?

A. Yes.

Q. They read:

> Sales realization for all products was favorable to our budgeted projections for the full year, 1971, to the extent of $3,832,000. Of the total favorable variance, $2,493,000 was in gypsum products and $1,339,000 from the remainder of our Division products lines. In planning the 1971 gypsum products budget, we forecasted prices above 1970 price levels and slightly above the level anticipated to result from the January, 1971, price increase. The budgeted wallboard sales realization level was not exceeded until June, 1971, after which it stayed fairly flat for the remainder of the year.

[10,524] Efforts to raise prices during 1971 were hindered by strong competitive pressures, and, of course, the Presidential price freeze order announced in August.

Now, we have dealt then, Mr. Hayes, with a number of price changes announced at least by National—I am talking now about published price changes—throughout this period beginning in 1968 or even in 1967 when you were a consultant to Mr—when you were assistant to Mr. Brown, then starting in 1968 when you were vice president in merchandising and moving on up to your presidency of the division up to the end of 1973. We have dealt with a lot of changes, and you have explained to us your involvement in these as the man who, except in the 1967 instances when you were merely an assistant to the chairman of the board, but thereafter your involvement as the proposer, the recommender, the formulator of whatever price actions National Gypsum was going to take with reference to its published prices?

A. Yes.

• • • • •

[10,525] Q. My question, Mr. Hayes, is throughout that entire period, and with particular emphasis on the part from 1965 on when you had the responsibility to formulate, propose, did you ever make any recommendations concerning prices, make any recommendations to Mr. Brown based on any advance agreement you had entered into with any competitor?

A. No, sir.

Q. Did you ever discuss with any competitor what your plans were with reference to the pricing that National Gypsum was considering and about to announce?

A. No, sir.

Q. Did any competitor ever discuss with you what his future plans were with reference to prices?

A. No.

Q. Did you in your deliberations about what you would recommend and what National would do, did you receive information from anyone who worked under you or who was superior to you about your competitor's plans?

A. No, sir.

[10,526] Q. Mr. Hayes, in your overall responsibility in charge of gypsum—of the Gold Bond Division, the Building Products Division, are you familiar with the fact that your company makes sales to and purchases from competitors who are also engaged in the business of making gypsum board machine products?

A. Yes, I am.

Q. In the period in which you have been active in this managerial role, since at least early 1968, can you indicate the companies with whom you have had transactions, either sales to them or purchases from them, and indicate in a general way the magnitude of the business and the particular customers?

A. Well, we sold paper, gypsum wallboard paper that is, during that time period, to Republic, Grand Rapids, Celotex, and occasional spot sales to Georgia-Pacific, to Flintkote. I believe those are the main paper customers that we had at some point during that time.

Q. Do you know whether you made any sales to either Dierks or Texas Gypsum?

A. Yes, sir, we did to both.

Q. Were those wallboard paper sales again?

A. Yes.

Q. All that you have referred to now are wallboard paper sales?

[10,527] A. Yes.

Q. And did you sell—incidentally, Grand Rapids, Dierks and Republic are all so-called single plant producers?

A. Yes, they are.

Q. And did you——

A. We may not have been the sole supplier in all these cases, but we were a supplier.

Q. Now, any other products that you sold to any of your competitor companies?

A. We sold gypsum wallboard to Kaiser Gypsum from the Phoenix, Arizona plant for their warehouse in Arizona, and

we sold gypsum rock to Celotex at Edgewater, New Jersey, and we sold gypsum rock also on the East Coast to Kaiser's two plants, and I believe one is in New Jersey and one is in Florida.

Q. Now, can you give us any idea of the order of magnitude over the five-year span, 1968 to 1973, to these companies, or perhaps—not in the aggregate—company by company of your sales to them?

A. Well, it was a substantial amount of money. I would say it was in the millions of dollars.

Q. To each of those companies that you have named?

A. Yes, over that full-time period.

Q. Now, have you also purchased products from any of your competitor companies?

[10,528] A. Yes.

Q. And could you say which ones?

A. We purchased paper on the West Coast where we did not have a paper plant from Flintkote. We purchased gypsum wallboard for our Tacoma warehouse from their Seattle plant. We did not have a plant up in that area. We purchased, I believe, gypsum block, a product which we did not manufacture, from the U.S. Gypsum Company for use in our manufacturing process as to process material. We purchased—I guess I mentioned the paper on the West Coast from Flintkote. Substantially that is it.

Q. Now, who were the people responsible under you for dealing with these purchases and sales from your competitor companies?

A. Well, it varied and it varied from time to time, but Mr. Duncan who was in charge of industrial sales in the 1968 period, before he moved on to another job, had an industrial sales responsibility there, and a man by the name of Shank had industrial sales responsibilities, and Ken Atwell had an administrative house sales responsibility that involved some of those products.

* * * * *

[10,539] By Mr. WARNKE:

Q. Mr. Hayes, you testified that on January 1, 1968, [10,540] you became Vice-President of Merchandising Operations?

A. Yes.

Q. And at that time Mr. Jay Nicely reported to you; is that correct?

A. Yes, that's correct.

Q. And did you remain his superior from that point on until December 27, 1973?

A. Yes, sir.

Q. And during that period of time was Mr. Nicely in a position where he had pricing authority?

A. No, sir.

Q. Would pricing authority lay with you, I believe you testified, as far as recommendations were concerned?

A. We are talking list prices now?

Q. Yes.

A. Yes.

Q. And with respect to those list prices, Mr. Nicely was solely a conselor to you; is that correct?

A. That's correct.

Q. All right.

Then Mr. Nicely reported directly to you?

A. Yes, sir.

Q. And you reported directly to Mr. Colon Brown?

A. Mr. Brown. Except for that period in '71 throught '73 when I reported to Mr. Tucker.

[10,541] Q. I am referring to the period of time when you were Vice-President of Merchandising Operations.

A. Oh, yes, sir.

Q. January 1, 1968, through December 14, 1969.

A. Correct.

Q. So at that time, Mr. Nicely was two steps removed from ultimate pricing authority; is that correct? There was you, and then Mr. Nicely, both of you were responsible to Colon Brown?

A. Yes, that's correct.

Q. All right.

Then on December 15, 1969, when you became President of the Building Products Division . . .

A. Yes.

Q. I don't remember—Did you say that somebody took over as Vice-President then of Merchandising Operations?

A. No, no. The position remained blank for some period of years actually after that.

Q. All right, sir.

But when you became the President of the Building Products Division, Mr. Nicely was still subject to your authority?

A. That's correct, he still reported directly to me.

Q. And he still had no pricing authority of his own?

A. That's correct.

[10,542] Q. All right.

Then in February of 1970 you became Group Vice-President as well as President of the Building Products Division?

A. Yes.

Q. And at that point there was still a vacancy in the Vice-President for Merchandising Operations?

A. That's correct.

Q. So here again Mr. Nicely was subject to your control and authority?

A. That's correct.

Q. And had no pricing authority?

A. That's correct.

Q. All right.

Then when you became Group Vice-President and Director for D.M.H.—which I believe you testified was Mobile Housing—and also remained head of the Building Products Division, was Mr. Nicely still subject to your authority?

A. No. And if I may correct that, I was a Corporate Group Vice-President.

Q. I see.

A. And I just took on the additional responsibilities in March of 1973 for the Mobile Home Division as well as Building Products.

[10,543] But at that date I was no longer President of the Building Products Division. We appointed a new President of the Building Products Division, a Mr. Killian.

Q. I see.

And Mr. Nicely reported them to Mr. Killian?

A. Reported to Mr. Killian, that's correct.

Q. So at that stage there was Colon Brown with ultimate authority, then there was you, and then there was Mr. Killian?

A. That's correct.

Q. And then Mr. Nicely?
A. That's correct.
Q. All right.
Then in 1971, when I believe you testified a Mr. Tucker. . . .
A. Yes.
Q. . . . was appointed as President of the corporation.
Q. And during that period of time you reported to Mr. Tucker?
A. That's correct.
Q. So at that stage there is Mr. Brown, who had the ultimate authority, there is Mr. Tucker, then there was you. And then there was Mr. Killian, and then there was Mr. Nicely?
[10,544] A. No, no, Mr. Killian wasn't in the picture at that time. I was President of the Building Products then.
Q. I see.
A. That was prior to Mr. Killian.
Q. Then when Mr. Killian came in Mr. Nicely was five steps down?
A. No When Mr. Killian came in Mr. Tucker was no longer there.
The Court: You can't get beyond four.
By Mr. Warnke:
Q. Mr. Nicely was then four steps down; is that correct?
A. Yes, sir.
Q. And at this period of time did Mr. Nicely have any authority to change any prices?
A. I think I'd have to answer that in this way: We delegated at some points during that time authority to people who reported to Mr. Nicely for meeting competition at certain times, under certain guidelines. And I don't believe we ever spelled out that Mr. Nicely had that authority to meet competition. But just by inference, that it went to one of his subordinates, I'd have to say that he had it, yes.

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CROSS-EXAMINATION

By Mr. Fricano:

• • • • •

[10,561] Q. Do you now recall, sir, that while you were planning an increase for January 1, 1971, that your competitors did beat you to the punch on that one?
A. Yes.

• • • • •

[10,563] Q. When you issue a price increase, notice——
A. Yes.
Q. ——at National Gypsum, at times you have a doubt in your mind as to whether or not it is going to come off, don't you?
A. Every time.
Q. Every time.
Nevertheless, when you issue that price increase, the announcement to the trade, you are serious about it, aren't you?
A. Absolutely.
[10,566] Q. Do you believe, based upon market conditions, the situation which faces you internally as well, that this price increase is something that National Gypsum should have?
A. Yes.

• • • • •

Q. Let me put it this way, sir. Were these price sheets which you obtained in the field from the Georgia-Pacific Company meaningful to you?
A. Yes.
Q. All right, sir.
Why?
A. Well, they were the only evidence I had. And you will recall that Georgia-Pacific was not one to be out there [10,567] announcing price increases very often. Our problem with Georgia-Pacific was entirely different than that.
And on this, in my case, it was hard evidence of something. I didn't know what that something was until we had the ability to analyze it.
Q. And because they were hard competitors of yours, Georgia-Pacific——
A. Yes.

Q. ——it was hard evidence to you of an intention on their part to obtain, if possible, the increased prices which they had announced?

A. Yes.

Q. Did you know that the announcement came from the Bestwall Division of Georgia-Pacific, and not from the distribution houses?

A. No, I didn't know it.

Q. It doesn't make any difference——

A. It wouldn't make any difference.

Q. That is right. It would not have made any difference to you.

And this was in 1971, was it not?

A. It was effective in '71, yes.

Q. And would it be fair to state, sir, for every other price increase that came about in 1972 and 1973, where there was one, where Georgia-Pacific went along with it, it was [10,568] important to you, meaningful?

A. I would make it broader than that. Every announcement by a competitor any place in the United States, by—on any one of the products we sell is meaningful in some way to us; yes.

Q. I understand that, but the point I am trying to make—and I think you have emphasized this yourself—we have seen charts in this courtroom, both National Gypsum and United States Gypsum charts, that show a great, big green line for Georgia-Pacific, showing alleged price cuts, the degree of competition. My point is this: you find Georgia-Pacific an aggressive competitor, isn't that your testimony?

A. That is correct.

Q. When Georgia-Pacific—let's take it another way.

Throughout the time period from 19—you have had some kind of sales responsibilty except for one year, since 1960, have you not, when you were director of corporate analysis?

A. There were two years I did not, but we are talking about '68 through '73, here, I understand.

Q. All right.

From the period when you had sales responsibility of any type or character subsequent to 1965——

A. Yes.

Q. ——when Georgia-Pacific issued a price announcement, [10,569] either initially increasing prices or going along with a price increase announced by someone else, throughout that period up to December 27, 1973, that was meaningful to you; was it not?

A. Yes, and I will go beyond that, because any competitor that made any kind of announcement, it was meaningful, but what we were really interested in was the actual transaction price, and that was why we had 350 people out there trying to get marketing intelligence for us.

Q. Was that Georgia-Pacific price announcement that you just saw for 1971, as well as all the other Georgia-Pacific price announcements that were sent to you in from the field, the market intelligence to which you were referring?

A. This was a minor, minor part of the market intelligence, what they put on a piece of paper and put in the mail. We were interested in what actually happened.

Q. Are you saying, now, they are not meaningful to you, sir?

A. They are meaningful, but not in the degree hard evidence is that we can pick up in the form of invoices and transactions and prices.

Q. You may correct me if I am wrong, but didn't you just testify that those price sheets picked up in the field were hard evidence?

A. Yes, but we are talking about the degree, now. [10,570] The real sale price is it.

So if prices—what they are proposing to do next January is meaningful, but not as meaningful as what they actually do in January, when I get that invoice.

[10,571] By Mr. Fricano:

Q. So, let's take an example. If you had increasing prices and, as I understand your testimony, there was only one decrease nationally—and that was in May of 1967—if you had increasing list prices throughout the period from 1966 to December, 1973, but the actual prices being realized weren't as high, would that be a bad condition?

A. You had cited a hypothetical case, because we didn't.

We had several cases where we changed our published price and came down from the previous list. Talking list prices.

Q. I thought you said the only decrease in the last ten years that you could recall was the one in May 1967?

A. General across-the-board decrease.
Q. Yes, sir.
A. From list.
Q. Right.
A. But we showed on these charts with the red dots on them——
Q. Measle charts.
A. ——that we did in fact bring our, change our zone prices downward.
Q. But that wasn't across-the-board. I mean nationally.
A. Nationwide, no.
[10,572] Q. However, if your list prices were going up——
A. Yes.
Q. ——isn't it fair to say, even though you weren't getting your list prices all the time, that your actual realized prices were also going up?
A. No, sir.
From 1968, '69, and '70, they went down just like that. [Indicating.] And at the end of '70 they started up gradually. But at the end of a six-year period nationwide they never got back to the price they had been.
Q. '69 was a bad year; wasn't it?
A. '69 was the middle of three bad years. And '70 was worse. From a price realization point of view.
Q. I will direct your attention, Mr. Hayes, to an exhibit that was created on the board from documents in evidence.
It is Government Exhibit 5075 for the year 1969, covering the time period from March to November.
You will see, sir, that to a company known as Yukon Lumber Company in Westmoreland County in this particular situation—And this is from documents in evidence.
A. Yes.
Q. Put in by National Gypsum and by the Government. That the list price for one-half inch wallboard on March 14th was $48.25. Do you see that?
[10,573] A. Yes, sir.
Q. And on that date three 5's off were authorized to Yukon Lumber Company, so he was getting an actual price of $41.37. These have all been computed and stipulated to.
A. I will accept them.

Q. On June 23, a month after a price increase——
A. Yes, sir.
Q. There were four 5's off, or a price of $53.25, a list price, with an actual price of $43.37.
A. Yes.
Q. The price went up; didn't it? The actual price.
A. Yes, it did.
Q. And the same thing happened on September 22 after another price increase where the list was $57.25, and the price went to $44.30; didn't it?
A. Yes.
Q. And on November 12 there was six 5's off. We have gone from three 5's to six 5's. And it wasn't until that time that the price came down, but it was still higher than it was on March 14; is that not correct?
A. Absolutely.
Q. Now, do you describe that as a calamity?
A. I picked one customer in one county in about eight months out of a year, out of six years. This particular case is not a calamity. I was trying to do this. That's [10,574] exactly what I was trying to do, get price increases posted on the published list so that any actual transaction price did not go down further. I was trying to hold the line on what we were getting for our sale.
Q. And you accomplished your objective; did you not?
A. If that was National Gypsum selling to Yukon Lumber, we did at least in that one case.
Q. You got your list price up. In getting your list price up, you got your realized price up; correct?
A. If that is National Gypsum in that case, yes, sir. And that's what I was trying to do.
Q. Do you know, sir, whether or not that's the only situation that existed in 1969 with only one customer?
A. No. I hope there were a lot of them.
Q. Well, isn't it fair to state, sir, that there were a lot of them pursuant to your own plan?
A. Of course.
1969 prices were below 1968, so in some cases I was successful.

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[10,591] Q. Did your subordinates, who were both authorized to make these calls and who in fact made these calls, keep a written record?

A. I believe that they did not, and I know that only because I have heard it as a result of testimony in this case.

Q. Well, what was your reaction to that, Mr. Hayes?

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Q. Mr. Hayes, you testified that one of the purposes for which verification was allowed was so that National didn't run afoul of the Robinson-Patman Act, did you not?

A. That is correct.

Q. That is first-hand?

A. I testified that.

[10,592] Q. That is first-hand knowledge on your part now, isn't it?

A. What?

Q. I mean that testimony was your mental processes while you were at National Gypsum during this time period. Did you authorize verification to continue?

A. Well, all right. I am sorry. Would you ask the question over again, please.

Q. Did you not testify on direct examination that there were two purposes for which verification was allowed to continue?

A. Yes.

Q. And the first one that you mentioned was the Robinson-Patman Act, did you not?

A. Yes.

Q. Well, if you were concerned at National Gypsum of not running afoul of the Robinson-Patman Act, why is it, sir, that your subordinates were not instructed to keep a record of those telephone calls?

Mr. WARNKE. Objection, Your Honor. It calls for a legal conclusion. .

The COURT. You can ask him why he didn't do it if he was the one that was supposed to do it, and that is all.

Mr. FRICANO. Well, as I understand [10,593] the witness's testimony, he did not do it personally.

The Witness. That is correct.

The COURT. All right.

Mr. FRICANO. But he did authorize his subordinates to do it, and I am trying to find out what he told them.

The COURT. You ask him that if you want to, but that is not what you are doing.

By Mr. FRICANO:

Q. Did you tell your subordinates when you authorized them to engage in verification, and to authorize others to engage in verification, to keep a written record?

Mr. DELONE. I object to the form of that question because it assumes both this was authorized and authorized them to authorize others. I don't recall any such testimony from this witness.

The COURT. Well, with Mr. Fricano's permission, I am going to rephrase his question.

The WITNESS. May I try to answer this and help here.

The COURT. Well, I am going to rephrase his question, if I may.

The WITNESS. All right.

The COURT. Did you at any time tell anybody that he should keep records of phone [10,594] verifications?

The WITNESS. No, sir, I did not.

The COURT. All right.

By Mr. FRICANO:

Q. Why not?

A. I didn't think it was important. The person that made the verifications, certainly in the case of Mr. Atwell, had the authority to make the verifications as from our policy, not from what I authorized him to do. And he was the only one that had authority, that he then didn't have to ask anybody else's permission to take action. So he had no need of records. The action was his, what he was trying to get at, if he chose to take it.

[10,595] By Mr. FRICANO:

Q. Well, did you testify that you had to engage in this practice, as you call verification, one of the reasons was because the salesmen—not the salesmen—excuse me—the customer might be lying to the salesmen?

A. That was one of the reasons I gave, yes.

Q. Did you keep——

something new or different that had not been reported before from the field. Do you recall that?

A. Yes.

Q. Now, something new and different could be the [10,599] first break in a price after a price increase, couldn't it?

A. Yes, it could.

Q. In an important market?

A. Well, there are limitless things that could be something new and different.

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[10,603] Q. Now, you have testified as to why you authorized and why others made these price checks. Why?

A. I am sorry. I am not sure I understand the term you are taling about here, price check.

Q. All right; verification, sir.

A. Okay.

[10,604] Q. Did you authorize your subordinates to respond to similar inquiries from their competitors?

A. Yes.

Q. Why?

A. They were authorized, already, by policy.

Q. Why did your subordinates respond to inquiries of National?

A. Well, during that time period, when it was permitted under our policy, there is a very simple fact, that nobody was going to tell us anything unless we reciprocated.

Q. Did you have an agreement, then, with your competitors to exchange such information?

A. No sir. No, sir.

Q. Did any competitor of yours ever tell you why he wanted the information from you?

A. No, sir.

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[10,605] Mr. FRICANO. Mr. Grainer, may the witness please have Government Exhibits 29 and 30–A?

By Mr. FRICANO:

Q. Sir, these two documents, which are in evidence, are dated October 25, 1968, and October 28, 1968. The first docu-

A. For verification.

Q. I see, sir.

Did you keep a record of those customers you found out were lying as a result of conversations with competitors?

A. No, I don't believe that we did. We may have, but I am sure of one other thing, though, because I, myself, knew of one or two, that they were unreliable after that.

Q. You referred on your direct examination to a Mr. Kroth and you stated that you had found out that he performed these verification calls for the first time in preparation for your testimony here, is that correct?

A. Yes, sir, and I stated that in error. I misspoke. I meant Mr. Webster.

I knew all along that Mr. Kroth was authorized, because he was acting in Mr. Atwell's behalf when Mr. Atwell wasn't available.

[10,596] Q. Did you testify on direct examination that Mr. Kroth was authorized?

A. I don't know that I did. I don't know that I testified at all in that regard. I knew that Mr. Kroth had made verification calls, if that is what you are getting at, and I did say Kroth instead of Webster and I believe it was yesterday. And the days run together.

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[10,598] Q. Isn't it the fact, sir, that from time to time you instructed Mr. Kroth to make telephone calls to competitors?

A. I don't recall any, but I may have. I certainly—certainly it was within my scope at the time.

Q. How about Mr. Atwell?

A. I——

Q. Did you instruct him?

A. I don't recall any specific instance. I may have, could well have.

Q. How about Mr. Nicely?

A. I don't believe I—no—again, I could have, but I don't recall any.

Q. Now you also testified that the second reason for the verification calls, and you also said this illustrated their infrequency, as you explained it, that you did it when there was

ment, No. 29, has been identified as notes which Mr. Atwell kept for a talk he was going to give to regional managers.

If you will notice, in the first paragraph, it states: "To my knowledge, no one of you have been authorized by management to discuss prices with competition, but it is quite evident that some of you do this."

Were you aware that others within the organization [10,606] at this time were discussing prices with competitors?

A. No, sir.

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Q. Did you know that, in 1968—or did you authorize—perhaps that's the better way to approach it—in 1968, at this time, Mr. Atwell or Mr. Nicely, to, in turn, authorize others at National Gypsum to discuss prices with competitors, with the precaution that they shouldn't take notes?

A. No. No. Certain people were authorized, under our policy, in 1968, and I didn't have anything to do with it.

Q. But you were directly in a line—as I understand your testimony, that there was a line between you, Nicely, [10,607] and Atwell.

A. That is correct.

Q. There is testimony in this record that Mr. Kent, of your credit department, in the time when the policy of verification was in effect, made approximately 15 calls.

Now, if Mr. Barber, who was also authorized, made 15 calls, and if Mr. Campbell made 15 calls, and Mr. Hornaday made 15 calls, and if Mr. Griffith made 15 calls, in this time period, that would amount to about 75 calls.

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Q. Given those figures, as I have represented them, you [10,608] testified that there were about a hundred to 200 competitive extension of terms situations from 1968 to 1973; did you not?

A. No, sir. I don't believe—oh, yes, I did. I said—you have got two unrelated matters, here.

Q. Straighten me out, then.

A. Completely unrelated matters.

I said that, during 1968, and for a period which I recall was four or five years, that we met competitive terms of others between a hundred and 200 cases. It could have been the same customer, whatever, each year.

Q. Each year?

A. Each year of those five years, and I didn't say anything about the method of how we arrived at whether they were going to meet this competition or not. It had nothing to do—it is an isolated number of what happened as a result of competition in the marketplace, and it has nothing to do with verification, that I know of, unless some of them may have had something to do with verification in 1968, but not after that.

The hundred to 200 in '69, '70, '71, and so on, were labeled in an entirely different manner.

[10,609] By Mr. FRICANO:

Q. Were you successful in handling them in a different manner subsequent to the change in your policy?

A. Well, I don't know how I'd evaluate our success. I know that we did it that number of times. We should have been doing it a thousand times, perhaps, and maybe that would have qualified us for success. Or maybe we shouldn't have done it at all. But we met competitive terms each of those years between 100 and 200 times. Terms of sale now.

Q. And, according to your testimony, in early 1969 when the policy changed at National Gypsum, and you allegedly made no more telephone calls, things worked out all right for you subsequent to that time?

A. No. Things went to hell in a handbasket.

Q. So the telephone calls did help you in the time period that they were going on?

A. They were an input in that time, that's all. But things went the same direction in 1968. From the time I took over as Vice-President of Merchandising Operations our sales realization went down in a toboggan for three years.

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[10,633] Q. Is it fair to state that, for the period January, 1966 through September, 1968, that actual prices, actual prices being obtained in the marketplace, with respect to their fluctuation, now, were reasonably stable?

A. I can't really talk about '66 and '67, and you point to September, I believe, of '68—no. I would say that they were down more at the tail end of that period that you asked about.

Q. I understand that, sir, but were they reasonably stable in that period from 19—January, 1966, to September 1968?

A. It is my recollection that they were, but I didn't have any connection with it.

Q. Now, how about 1969; were prices going steadily downward throughout the United States in that year?

A. Our price realizations were lower at the end of [10,634] the year than they were at the beginning, and they had gone down with some regularity, as I just depicted.

Q. All right. Well, would it be fair to say that, in certain markets, prices, perhaps, weren't going down and—steadily?

A. I believe I said, yesterday, with some force, that I was attempting not to let them go down. That was my motivation, and, if I was successful in certain markets—I hope I was.

Q. Well, isn't it a fact, sir, that, even if you took the year—the whole, 1969, that you would find that prices went up during 1969 and then just dropped off at the very end of the year?

A. That is not my recollection. My recollection is it was a steadily downward trend.

Q. Well, then—and yesterday, you testified, I believe—you correct me if I am wrong—that prices at the end of '69 were not substantially below the year's average price?

A. That is correct. If you have a steadily downward trend, the year's average will fall with something about June.

Q. Have you ever said that on a prior occasion?

A. I believe I wrote it in a yearly report that I submitted.

[10,635] Q. And that's——

Mr. FRICANO: May the witness have that, please, Mr. Grainer? And that's DX 429, the National 429.

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[10,636] Q. Is this the document to which you have reference?

A. Yes, it is.

Q. And in this document, dated September 28, 1970——

A. Correct.

Q. ——that you wrote to Colon Brown, in the first paragraph, there is, the heading for the first paragraph is "1969 Experience"?

A. Yes.

Q. And in that, you state: "Our price increases attempted in January, May, and September——"

Now, that would be 1969; correct?

A. Correct.

Q. "——eroded, in the months following the effective date."

A. That's correct.

Q. "However, at year end, our selling price level was not substantially below the year's average price——"

A. That's correct.

Q. "——and, thus, despite a decreasing marketplace, we had effectively maintained a fairly level gypsum price [10,637] level, even if we were unsuccessful in our attempts to increase the price level."

A. That's correct.

Q. In light of your own statement, written contemporaneously, do you care to change your testimony that I read to you earlier about the trend going down the whole time period?

A. No, I do not.

The COURT. Do you want to explain that, sir?

The WITNESS. Well, if you plot this, we have got a lot of different things here. We have got average prices. If you plot this on a chart by months, by mill nets, you will find that there is a downward trend and that, at the year end, we are at about the average price.

I am sorry. That's my recollection from the chart that I looked at.

By Mr. FRICANO:

Q. Do you mean that if, in January, your average selling price is $40, and then, in February, it is $41, and then, maybe, in May, it goes down to $39, and then, in June, to $38, and then, July, maybe, back up a little bit, but, by the end of the year you are back at $40, that's going downward?

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[10,639] The WITNESS. Yes. That's what I mean, yes.

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[10,718] • • •

The COURT. All right.